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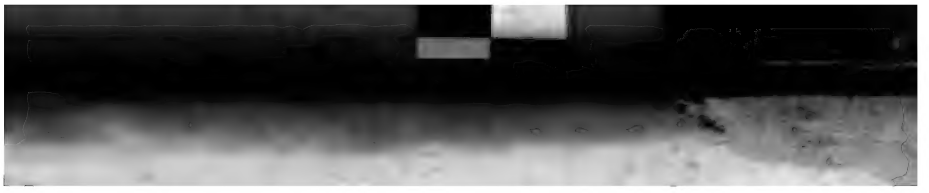

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REPORTS

OF

CASES

DECIDED IN THE

HIGH COURT OF CHANCERY,

BY

THE RIGHT HON. SIR LANCELOT SHADWELL,

VICE-CHANCELLOR OF ENGLAND.

By NICHOLAS SIMONS,

Of Lincoln's Inn, Esq. Barrister at Law.

VOL. XII.

CONTAINING CASES IN 1841 & 1842,

WITH A FEW IN 1843 & 1844.

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Lord LYNDHURST - - -	
Lord LANGDALE - - -	Master of the Rolls.
Sir LANCELOT SHADWELL - -	Vice-Chancellor of England.
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Sir WILLIAM WEBB FOLLETT -	

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CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

D'AGLIE *v.* FRYER.

1841:
19th February.

Will.
Construction.
Legacy.
Long Annuities.

A testatrix, having 115 *l.* long annuities standing in her name at her death, of which 65 *l.* like annuities had been purchased for her by *T. B.*, bequeathed her residuary estate to trustees, to be invested or continued by them in the public funds or at interest, the stocks, funds or securities to be varied at discretion, in trust to pay certain annuities out of the interest, dividends &c., and, subject thereto, to pay the income of the said trust-monies, stocks, funds and securities, to *S. N.* for life: and, subject thereto, she gave all the residue of her estate to the trustees absolutely. By a codicil she gave all the money funded by *T. B.* in her name in the long annuities (which she mentioned to be 50 *l.* per annum) to *C. D.* after *S. N.*'s death. Held that 50 *l.* of the long annuities, were specifically bequeathed to *C. D.*

THE Countess *de Front*, at the date of her will and at her death, had 115 *l.* long annuities standing in her name, of which 65 *l.* long annuities had been purchased and funded in her name, by *T. D. Boswell*, in three separate sums and at three different times in the years 1822, 1823 and 1824. On the 19th of February 1824, she made her will, and, without having mentioned her long annuities, disposed of her residuary estate in the following words:

"I bequeath the residue of my personal estate to *W. V. Fryer*, *Anthony George Wright* and *John Wright*, to be invested or continued by them in the

1841.

D'AGLIE v. FRYER.

public funds or at interest; the stocks, funds or securities to be varied at discretion: and my will is that the said *W. V. Fryer*, *A. G. Wright* and *John Wright* do stand and be possessed of and interested in the said stocks, funds and securities, and the interest, dividends, and annual produce thereof, upon trust to pay, out of such interest or dividends or annual produce, to the said *W. V. Fryer* and his assigns, an annual sum of 100 *l.*, during his life; the said annual sum to be payable by quarterly payments, the first quarterly payment to be made at the expiration of three calendar months next after my decease, and a proportional part of the said annual sum to be payable from the last day of payment preceding the death of the said *W. V. Fryer* up to the day of his decease; and upon trust to pay the whole of the income of the said trust-monies, stocks, funds and securities (subject to the payment of the said annuity to the said *William V. Fryer* so long as the same shall continue payable) to *Sarah* the wife of *Charles Neve*, for her separate use, free from the control of her present, or any future husband; and upon trust, if the said *Charles Neve* shall survive the said *Sarah Neve*, to pay, to the said *Charles Neve* and his assigns, the annual sum of 300 *l.*, during his life, the said annual sum of 300 *l.* to be payable by quarterly payments, the first quarterly payment to be made at the expiration of three calendar months from the decease of the said *Sarah Neve*, and a proportional part of the said annual sum to be payable from the last day of payment preceeding the death of the said *Charles Neve* up to the day of his decease." After the death of *Sarah Neve* and subject to the payment of the annual sums of 100 *l.* and 300 *l.*, the testatrix gave all the residue of her estate to *W. V. Fryer*, *A. G. Wright* and *John Wright* absolutely.

1841.

D'AGLIE v. FRYER.

The testatrix made a codicil, dated the 17th of October 1826, which contained the following bequest: "All the money funded by the late *Thomas David Boswell* Esq. in my name in the long annuities, 50 *l.* per annum, I give to my godson *Charles*, the son of Count *D'Aglie*, the Sardinian Ambassador at this Court, after the decease of my sister, Mrs. *Sarah Neve*."

The testatrix died in January 1835.

The bill was filed by *Charles D'Aglie*, against the trustees of the will and Mrs. *Neve* (*Charles Neve* being dead), insisting that, according to the true construction of the codicil, the Plaintiff was entitled, in reversion expectant on Mrs. *Neve*'s death, not merely to 50 *l.* long annuities, but to all the money which *Boswell* had funded in that stock, in the testatrix's name, that is, the money which he had invested in the purchase of the 65 *l.* long annuities; and that the trustees, instead of suffering that sum of stock, as they had done, to remain unconverted, ought to have sold it immediately after the testatrix's death and invested the proceeds in the three per cents. The bill prayed that the trustees might be decreed to invest in the three per cents, such a sum of money as would have been produced by the sale of the 65 *l.* long annuities if the same had been sold immediately upon the testatrix's death, and that the dividends might be paid to Mrs. *Neve* for her life, and that, after her death, the capital might be transferred to the Plaintiff.

Mr. *Knight Bruce* and Mr. *Beavan*, for the Plaintiff, said that, under the will, the whole of the testatrix's residuary estate ought to have been converted into permanent securities; that the codicil contained a bequest, not of the long annuities which *Boswell* had purchased

1841.

D'AGLIE v. FRYER.

in the testatrix's name, but of the money which he had invested in the purchase of that stock in the testatrix's name; and, consequently, that the trustees ought to have converted the long annuities as well as the other parts of the testatrix's residuary estate: that, the words in the codicil: "Fifty pounds per annum," were an erroneous description of the amount of the long annuities purchased by *Boswell*, and that it was a rule of law that *falsa designatio non nocet*; and, therefore, the Plaintiff was entitled to the relief prayed by his bill.

Mr. *Jacob*, Mr. *Parry*, and Mr. *Tillotson* appeared for the Defendants: but

The VICE-CHANCELLOR, without hearing them, said:

It seems to me to be a specific gift of 50*l.* per annum long annuities.

The testatrix first uses the expression: "All the money:" then she shows what she means by those words, namely, 50*l.* per annum.

The proposition is true that *falsa descriptio non nocet*; but then it must be connected with a *clara descriptio*, that is, what is clear shall not be cut down by something erroneous; but this lady seems to have expressly declared what she does mean. It seems to me to be a clear expression of intention to give 50*l.* per annum long annuities.

41 :
February.

Will.
Construction.
Legacy.

Testator bequeathed to *J. W.* 1,000 *l.*; to his sister, *M. W.* 200 *l.*; to their mother 200 *l.*; and to the three aunts of *J. W.* and his sister *M. W.* 100 *l.* each. Held that the last bequest included the aunts, but not the sister.

the
sister
whether
0 *l.*, as well

the clause in the
ght to be read thus:
James Wemyss, and, to
each:" that no reason
g so lengthened a descrip-
prior legatees; and that the
the will as making a bequest,
a proposition.

executors, said that it was not pro-
stator could have intended to give a
lividual, to whom he had, so shortly
nother legacy; and that the construction
tended for, did not require any word to be
He cited *Weld* v. *Bradbury* (*a*), and *Lugar*
(*b*).

VICE-CHANCELLOR:

the whole of the will together.

testator, first of all, says: "To Captain *James*
yss, 1,000 *l.*; to his sister, *Mary Wemyss*, 200 *l.*"

(*a*) 2 Vern. 705. (*b*) 1 Cox, 250.

1841.

TRAIL v. KIBBLEWHITE.

Then he says, not to *her*, but "to *their* mother 200*l.*" So that he does not refer to the last antecedent; but describes the legatee by the relationship which she bears to *both* the preceding legatees. Then, in the bequest to the aunts, he says: "And, to the three aunts of Captain *James Wemyss* and his sister *Mary Wemyss*, 100*l.* each;" which is exactly the same sort of phrase as he had before used in describing the mother. As he had before described the mother by the relationship which she bore both to her son and to her daughter; so he describes the aunts by the relationship which they bore both to their nephew and to their niece.

Declare that *Mary Wemyss* is entitled only to a legacy of 200*l.*

1841: 19th February.

Pleading. Multifariousness. Heir. Creditor. Parties.

BROWN *v.* WEATHERBY.

AFTER the demurrer of *Ann Douglas* and *J. H. Douglas* had been allowed for want of parties (see ante Vol. XI. page 283), the bill was amended by making *Sedgwick*'s widow a defendant, and stating that she was the devisee of her husband's real estates; that *Stanton* had proved his will; and that *Ann Douglas* alone had proved her husband's will; and by praying, in addition

A. was a creditor of a firm consisting of *M. N. O. P.* and others, and also of a firm consisting of *M.* and *N.* *M.* and *O.* died, and, afterwards, *N. P. & Co.* became bankrupt. *A.* then filed a bill on behalf of himself and all the other creditors of *M.* and *O.*, against the executors and devisees of *M.* and *O.*, and the assignees of *N. P. & Co.*, for payment of his debt out of the real and personal assets of *M.* and *O.* *N.* demurred to the bill for multifariousness, and, *ore tenus*, because neither the heir of *M.* nor of *O.* was a party to the suit. The Court overruled the first ground of demurrer, but allowed the second.

to the relief sought by the original bill, that *Sedgwick*'s real estates might be sold and the proceeds applied in payment of his debts in a due course of administration.

Weatherby demurred for want of equity and for multifariousness, and, *ore tenus*, because *Sedgwick*'s heir was not a party to the suit.

Mr. *Jacob* and Mr. *James Russell*, in support of the demurrer:

The amended bill is more multifarious than the original bill was; for, in addition to the relief prayed by that bill, it seeks to make *Sedgwick*'s real estates made available to the payment of the debts due to the banking company and the other creditors on whose behalf the Plaintiff sues. Consequently the objection in respect of multifariousness, applies, with greater force, to the present bill, than it did to the former one.

The bill is filed on behalf of the bank and the other creditors of *Douglas*, and on behalf of the bank and the other creditors of *Sedgwick*: not on behalf of the bank and the other joint creditors of *Douglas* and *Sedgwick*; for there were no joint creditors of those two persons. In *Wilkinson* v. *Henderson* (*a*) the bill was filed by one joint creditor on behalf of himself and the other joint creditors of the firm of *Shepherd & Hartley*; and it was alleged and admitted that all the separate creditors had been paid, and that there was a surplus. So too in *Devaynes* v. *Noble* (*b*), the bill was filed on behalf of the joint creditors of *Devaynes & Co.* In this case

(*a*) 1 Myl. & Keen, 582.

(*b*) 1 Mer. 528. The bill in *Baring* v. *Noble* was filed on behalf of the joint creditors.

1841.

BROWN v. WEATHERBY.

there is no allegation that either the separate creditors of *Douglas*, or the separate creditors of *Sedgwick*, have been paid their debts. There is no joint estate of *Douglas* and of *Sedgwick*; and there is no community of interest between the Plaintiff and their separate creditors. What pretence is there for saying that, because two individuals have some joint liabilities, their estates shall be administered in one and the same suit? It is clear that, on account of the character in which the Plaintiff sues, the bill is multifarious. *Salvidge* v. *Hyde* (*c*).

The amended bill asks that *Sedgwick*'s real estates may be sold and the proceeds applied in payment of his debts. The Court cannot give effect to that part of the prayer, without having his heir at law before the Court. *Mitford* on Pleading, 3d edition, page 171, *Graham* v. *Graham* (*d*); *Anon.* (*e*); *Williams* v. *Whinyates* (*f*).

Mr. *Knight Bruce* and Mr. *Teed*, in support of the Bill:

Sedgwick's heir at law is not a necessary party to this suit. *Weeks* v. *Evans* (*g*). An objection to a sale by a devisee, out of Court, is never made because the heir is not a party to the conveyance. Nor is the heir a necessary party to a suit, the object of which is to have the trusts of the will carried into execution; unless the Plaintiff wishes to have the will established.

Next. In order to entitle a creditor of a partnership to obtain payment of his debt out of the assets of a

(*c*) 1 Jacob's Rep. 151.
(*d*) 1 Ves. jun. 272.
(*e*) Ibid. 29.
(*f*) 2 Bro. C. C. 399.
(*g*) *Ante*, Vol. VII. p. 546.

deceased member of the firm, it is not necessary for him to show that the firm is insolvent. *Winter* v. *Innes* (*h*). If *A.* and *B.* execute a joint and several bond, and both of them afterwards die; the bond-creditor has a right to bring both their estates before the Court in one suit. Here the Plaintiff has a claim upon the estates both of *Sedgwick* and of *Douglas*: has he not then a right to unite their estates in one and the same suit? He sues on behalf of all their creditors; because a creditor cannot pursue real estate unless he sues on behalf of himself and all the other creditors who are entitled to come on the real estate. How then could the bill have been framed otherwise than it is? The record was, substantially, in the same state when it was brought before the Court on the argument of the former demurrer, as it is now; and all the objections which have been made to it on the present occasion, were then submitted to your *Honor*'s consideration.

The VICE-CHANCELLOR:

With respect to multifariousness the case stands, in substance, as it did when it came before me on the former demurrer: and I must say that it was then and still is my opinion that, if the case of *Wilkinson* v. *Henderson* is to stand, the objection on the ground of multifariousness, ought not to be allowed to prevail.

In that case, the creditor of a partnership consisting of two individuals, one of whom was dead, filed his bill, against the surviving partner and the personal representative of the deceased partner, for payment of the debts due to himself and the other creditors of the firm, out of

(*h*) 4 Myl. & Cr. 101.

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the estate of the deceased partner: and Sir *John Leach* M. R. held that the plaintiff was entitled to the relief which he asked, notwithstanding the surviving partner was not insolvent; and that the surviving partner was properly made a co-defendant to the suit, as he was interested in contesting the demand of the plaintiff and of all other persons claiming to be creditors of the firm.

The principle of that case applies to a case constituted as this is. Here a creditor of the partnership of the seven, who is also a creditor of the partnership of the two (those two being two of the seven), has filed his bill against the personal representatives and devisees of the two deceased partners and the assignees of the surviving partners, alleging that the joint estate is insufficient to pay the joint debts. Taking that to be the case, the Plaintiff, who represents the joint creditors, has a right to have the surplus of the separate estate of each of the deceased partners, which may remain after payment of their separate debts, applied to pay such part of the partnership debts, as the joint estate may not be sufficient to satisfy. Now it seems to me that, for the purpose of ascertaining what is the surplus of the separate estate of *A.*, one of the deceased partners, the suit must be conducted in such a manner as that the persons interested in the separate estate of *B.*, the other deceased partner, shall know what is the true surplus. Because it is of very little use to have a suit in order to ascertain what is the surplus of the separate estate of *A.*, conducted in such a manner as not to bind those who are interested in the separate estate of *B.* And it appears to me that, inasmuch as if those interested in the surplus of the separate estate of *B.*, are not present in a suit which is instituted for the purpose of ascertaining what is the surplus of the separate estate of *A.*, as against the persons

interested in the surplus of the separate estate of *B.*, nothing is done. Because, if you filed a separate bill for the purpose of ascertaining what was the surplus of the separate estate of *B.*, you would have to do, all over again, in that suit, that which was before done in the suit filed for the purpose of ascertaining what was the surplus of the separate estate of *A.*: and I apprehend that it was upon that principle that Sir *John Leach* decided in the case of *Wilkinson* v. *Henderson*. And though I admit that there may be some inconvenience resulting from making all the parties interested in the different separate estates, parties to the same suit; yet I am far from thinking that all inconvenience is avoided by instituting separate suits against the parties interested in the several, separate estates. The result of which would be that you would have, as against the parties interested in each of the separate estates, to make out that you have duly administered the separate estate of every other partner. So that, as it appears to me, unless you do it all at once by one suit, you may have to do, four or five times over, that which you have done once already.

I must say that, in my opinion, the case of *Wilkinson* v. *Henderson* applies; and that the demurrer ought not to be allowed on the ground of multifariousness.

With respect to the question about the heir-at-law, I remember very well that, at the time when I had to prepare the bill in *Baring* v. *Noble* (*i*) I considered the point; and it was distinctly impressed on my mind then and has been ever since, that, to a bill filed under Sir

(*i*) 1 Mer. 529.

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Samuel Romilly's Act (47 Geo. 3, sess. 2, c. 74) for the purpose of administering real assets devised, the heir ought to be a party *.

* On the 20th of February 1841, his *Honor* delivered his judgment at length, upon the question regarding the heir; for which see *ante*, Vol. X. p. 125.

1841: 20th February.

Costs. Executor. Residuary legatee. Creditor.

A married woman being entitled to a share of a residue for her life, with remainder to her children, who were infants, a bill was filed by her and her husband and their children, by their father as their next friend, against the executor and the co-residuary legatees, for the administration and distribution of the testator's estate. When the executor put in his answer, a balance was due from him, and he paid it into Court. Afterwards, he paid the whole of testator's debts remaining unsatisfied, some of them before and the rest after the usual decree; whereby a balance greater than the fund in Court became due to him: and the *Master* so found. After the report had been absolutely confirmed, the husband died, and his widow having declined to take any step towards the further prosecution of the suit, the executor filed a supplemental bill, praying to have the fund in Court, exempt from all costs, paid to him, in part of the balance found due by the *Master*. The Court ordered the executor's costs of both suits, as between solicitor and client, to be first paid out of the fund, then the costs of the Defendants, the co-residuary legatees, of both suits, and, lastly, the costs of the widow and children, of the supplemental suit, but not of the original suit.

JACKSON *v.* WOOLLEY. WOOLLEY *v.* JACKSON.

MARY, the wife of *Thomas Jackson*, being entitled, for her life, to a share of a testator's residuary estate, with remainder to her children, who were infants, the original bill was filed by *Jackson* and wife and their children, by their father as their next friend, against *Woolley* and *Johnson*, the executors of the will, and the

other parties interested in the residue, for the administration and distribution of the estate. *Woolley*, who was the principal acting executor, having admitted, in his answer, that a balance was due from him, an order was made, in obedience to which he paid the balance into Court. Some of the testator's debts were paid before the commencement of the suit. *Woolley* paid the rest pending the suit, some before and some after the usual decree had been made. After the confirmation of the *Master's* report, from which it appeared that all the debts had been paid and that a balance considerably exceeding the fund in Court, was due to *Woolley*, *T. Jackson* died; and his widow having declined to take any step towards the further prosecution of the suit, *Woolley* filed a supplemental bill against her and her children and the Defendants to the original suit, stating the proceedings in that suit, the death of *Jackson* and the refusal of his widow to prosecute the suit, and praying that he might have the benefit of the suit and the proceedings therein, and that *the whole* of the fund in Court might be paid to him in part satisfaction of the balance found due to him.

Mr. *Knight Bruce* and Mr. *Wilbraham*, for *Woolley*:

Our client had a right to file a bill to get his own fund out of Court; and he is entitled to have the fund paid to him exempt from the costs of all the parties, except his co-executor, *Johnson*. *Johnson*, we admit, is entitled to be paid his costs out of the fund; as they are an expense which his character of executor has brought upon him: but the other parties, not having any fiduciary character, must bear their own costs. The surviving Plaintiffs in the original suit rendered the supplemental suit necessary, by refusing to appoint a new

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next friend. Besides, they were informed, by *Woolley's* answer to the original suit, that the estate was insolvent; and consequently your *Honor* cannot give them their costs, unless you are prepared to lay down that a residuary legatee of an estate, however insolvent, has a right to file a bill for an account at the expense of the executor. The suit has not been of the slightest benefit to any person whatever, as no creditor has come in under the decree. The report having been confirmed absolutely before *Jackson* died, the object of the supplemental suit was, clearly, to get the Plaintiff's own fund out of Court, and the Defendants ought not to have offered any opposition to it, but ought to have disclaimed; and, as they did not think proper to take that course, they ought to pay their own costs.

Mr. *G. Richards* and Mr. *K. Parker*, for Mrs. *Jackson* and her children, said that *Woolley* ought to pay the costs of the original suit and proceedings, of which he sought to have the benefit; and that, besides, he had acted improperly in paying the testator's debts, some of which he had paid after putting in his answer admitting a balance to be due from him, and the rest, after the decree had been made. *Mitchelson* v. *Piper* (*a*); *Larkins* v. *Paxton* (*b*); *Barker* v. *Wardle* (*c*).

The *Vice-Chancellor*:—The *Master* has allowed those payments. If they were improper, you ought to have excepted to the report.

Mr. *Cooper*, Mr. *Piggott*, and Mr. *Prendergast*, for the defendants to the original suit, who were in the same interest as the Plaintiffs in that suit, said that, in a suit by residuary legatees as well as in a suit by cre-

(*a*) *Ante*, Vol. VIII. p. 64.
(*b*) 2 Myl. & Keen, 320. (*c*) Ibid. 818.

ditors, the costs of the suit were the primary charge upon the fund in Court; and that *Woolley* could not stand in a better situation than the creditors whose debts he had paid would have done.

Mr. *Knight Bruce*, in reply, said that the costs of the original suit were incurred by *Jackson*, and not by his widow and children; that, if they had incurred any costs, they had lost their right to be repaid them, by their not having procured a new next friend to be appointed; and that the other Defendants must abide by the consequences of the next friend having died.

The VICE-CHANCELLOR:

The first question is, what is the general rule with respect to the costs of a suit instituted by creditors or by residuary legatees, where there is a fund in Court. I apprehend the rule to be that, in general, the costs of the suit must be first paid out of the fund. Therefore, *primâ facie*, if the original suit had been brought to a hearing for further directions, the Plaintiffs' costs and also the Defendants' costs, would have been paid out of the fund. But, in this case, the surviving Plaintiffs did not bring on the cause for further directions. After the report had been confirmed, *Jackson* died; and then *Woolley* filed a supplemental bill which set forth the death of *Jackson*; that he had no interest; that, by his death, the suit was without a next friend, and no further proceedings could be had in it unless a new next friend was appointed. The supplemental bill then stated that Mrs. *Jackson* had refused to become or to procure any other person to become the next friend of the infants: and the answer admits that an application had been made to her, on the subject, by Mr. *Woolley's* solicitor, to which she did not give any answer: and the result

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was that she did not put the suit in a situation in which it could go on. She might have named herself to be the next friend of the infant Plaintiffs; or she might have prevailed on some other person to be the next friend: but she took no step to carry on the original suit. The effect was that *Woolley* was obliged to file a supplemental bill; and, in the answer, it is admitted that that necessity was imposed on him by those who might have carried on the original suit. Then they now appear only because *Woolley* has brought forward the suit; and they ask for the costs of the original suit up to the time of *Jackson*'s death. Those costs, if due at all, could be payable to no one but his personal representative; but there is no person before me in that character. If Mrs. *Jackson* does not carry on the suit, and there is no personal representative of her husband before the Court, there is no person to whom I can direct the payment of the costs up to the time of the death of *Jackson*. *Woolley* alone has brought forward the matter by filing the supplemental bill; and, therefore, I cannot give the surviving Plaintiffs in the original suit, their costs of that suit.

The Defendants in that suit are in no fault; and, consequently, they must be paid their costs; and, as there is a fund in Court, their costs must be paid out of it.

In the course of the argument it was contended that, where there is a creditor's suit, the executor has no right to pay a debt after decree; but that observation must be taken with some qualification. If an executor, after decree, makes payment of a debt, with a view to be reimbursed out of a fund in Court, he must be reimbursed out of the fund, but not till after payment of

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the costs of the suit; that is, he must run the risk of the fund not being sufficient to pay the costs and also to reimburse him.

Then with respect to the costs of the supplemental cause. If I deprive the surviving Plaintiffs of their costs of the original suit, I cannot deprive them of the costs of the supplemental suit: for some machinery was necessary to be put in motion, in order to determine what was to be done with the fund in Court. And my opinion is that that fund must be applied, *in the first instance,* in paying, as between solicitor and client, the costs of *Woolley* and *Johnson* of both suits; then the other Defendants in the original suit must be paid their costs of both suits out of it; and Mrs. *Jackson* and her children must be paid the costs of the supplemental suit only.

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1841: 24th February.

Statute of Limitations. Debt. Debtor and Creditor. Acknowledgment of debt.

THIS was a creditor's suit.

The Plaintiff was the surviving executor of *Phœbe Smith.* He sued in respect of a debt of 200 *l.* and interest which he alleged to be due, to her estate, on a promissory note, from the estate of *James Poole,* whose

In 1835 *A.* filed a creditor's bill, against the administrator of his debtor, founded on a debt due on a promissory note, but in respect of which no payment of either principal or interest had been made since 1823. In 1832 the administrator, on the citation of a third person, signed and exhibited, in the Ecclesiastical Court, an inventory and account of the late debtor's assets and debts, in which *A.*'s debt was entered. Held that that entry was a sufficient acknowledgment, within Lord *Tenterden*'s Act (9 Geo. 4, c. 14), to take the debt out of the Statute of Limitations (21 Jas. 1, c. 16).

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administrator the Defendant, *Daniel Poole*, was. *Phœbe Smith* had appointed *James Poole* one of her executors, but he had neither proved nor acted.

The debt had become irrecoverable by lapse of time, unless the after-mentioned inventory and account was a sufficient acknowledgment of it, within Lord *Tenterden*'s Act (9 Geo. 4, c. 14, s. 1), to take it out of the operation of the Statute of Limitations (21 Jas. 1, c. 16).

The inventory and account *was signed by Daniel Poole*, and was exhibited by him on oath, in May 1832, in a suit intituled "*Poole* v. *Poole*," which had been instituted against him in the Consistory Court of *Lichfield*. The character in which the Plaintiff in *Poole* v. *Poole* sued, did not appear; but he was, of course, interested in *James Poole*'s personal estate, and was, probably, one of his next of kin.

The document exhibited consisted of two parts, the inventory and the account. The inventory purported to be a full, perfect and particular inventory of all and singular the goods, chattels and credits of *James Poole* which had, at any time since his death, come to the hands, possession or knowledge of *Daniel Poole*, his administrator; and it set forth the particulars of which the assets consisted, and the amount or value of each of them. The second part of the document purported to be a true, full and particular account of all payments and disbursements necessarily made and paid, by *Daniel Poole*, on account of debts due and owing from *James Poole*, and other expenses connected with the administration of his personal estate and effects. Its contents were partly as follows: "This exhibitant declares that he hath paid for the expenses of the letters of admi-

nistration granted, to this exhibitant, by the court of *Lichfield*, the sum of 138*l.* 10*s.* This exhibitant further declares that he hath paid for the expenses of the funeral of the deceased, 86*l.* 0*s.* 9*d.* This exhibitant further declares that he hath paid the following sums to the several persons undermentioned, for debts on simple contract, rent, taxes, wages, &c. This exhibitant further declares that he hath paid the following sums, to the undermentioned persons, in discharge of the principal and interest on the several bonds and notes due to them respectively from the deceased, &c. &c. This exhibitant further declares that he hath retained, to himself, for principal due to him from the deceased on note of hand, the sum of 495*l.*: and he further declares that he hath retained, for interest on the same from the 16th of November 1818 to the present time, the sum of 332*l.* 1*s.* 3*d.* This exhibitant also declares that he hath also retained to himself, for monies received by the said deceased on his account, the sum of 213*l.* 6*s.* 7*d.*: to twelve years' interest thereon, 126*l.* 6*s.* 7*d.* This exhibitant further *declares that there are still outstanding and owing the following sums and claims against the estate of the said deceased from the several persons undermentioned*, viz. Executors of the late Mr. *James Cope*, on bond, 200*l.*; three years' interest thereon, 30*l.*: *Executors of the late Phœbe Smith, on note*, 200*l.*; *interest thereon from the 1st October* 1823 *to 1st April* 1832, 85*l.*: Balance of principal due to Mr. *Moses Booth* of *Keel*, on note, about 30*l.*: To Mr. *J. Grocott*, schoolmaster, 63*l.* 15*s.* 3*d.* &c. &c.: Amount *claimed* by *Daniel Poole* and others as due to them for or in respect of four-fifth shares of the rents and profits of certain coal-mines received, by the deceased, for six years preceding his decease, 3,360*l.*: Principal *claimed* by Messrs. *John Wood* and *John Gardner* as executors

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of the late *Thomas Beech* deceased, as due to them on a promissory note given them by the deceased, 826*l.* 10*s.*: Amount *claimed* by the Rev. *W. Clark* for dilapidations and costs, 70*l.*: Amount claimed to be due to Mr. *Joseph Illidge* of *Newcastle*, 50*l.*"

Mr. *Jacob* and Mr. *Lovat*, for the Plaintiff, said that the document exhibited in the Consistory Court of *Lichfield*, was *signed*, by the Defendant, in May 1832; that the bill was filed in September 1835; and that the amount due to the estate of *Phœbe Smith* on *James Poole's* note, was entered in the document as a debt remaining due from *James Poole's* estate; and, consequently, that entry was a sufficient acknowledgment to take the amount due on the note, out of the operation of the Statute of Limitations. *Mountstephen* v. *Brooke*(*a*); *Freakley* v. *Fox* (*b*).

Mr. *Knight Bruce* and Mr. *Anderdon*, for the Defendant:

The question whether the signature of the document in the Consistory Court, is sufficient to exempt the debt in respect of which the Plaintiff sues, from the operation of the Statute of Limitations, is a legal question: and, before this cause proceeds any further, the Court ought to direct the Plaintiff to bring an action for the debt against the Defendant, and to restrain the Defendant from availing himself, in his defence to the action, of the fact that *James Poole* was one of the executors of *Phœbe Smith*. When the Plaintiff shall have established his debt by the verdict of a jury, then and not before, he will be entitled to the decree which he asks by his bill.

In order to take a debt out of the operation of the Statute of Limitations under Lord *Tenterden's* Act, it

(*a*) 3 Barn. & Ald. 141. (*b*) 9 Barn. & Cress. 130.

must have been acknowledged by or in some writing to be signed by the party *chargeable thereby*. Now the Defendant made out and signed the inventory and account, in his representative character: but, in that character, he was not the party chargeable thereby. The words, "chargeable thereby," mean a party against whom a verdict may be recovered for the debt, whether he has or has not assets to pay the debt. It is not even alleged that the Defendant has done any act whereby he has made himself personally responsible for the debt; nor has he admitted assets. Indeed it appears, by the inventory and account, that if he is allowed to retain the debts due to himself, (which he has a right to do,) the assets will not be sufficient to pay the intestate's debts. The case of a debtor's personal representative is quite different from the case of the debtor himself. The debtor is dealing with his own rights and property; but his representative is dealing with the rights and property of others. An acknowledgment by the debtor, is considered, by the Courts of Law, as evidence of a new or an implied promise to pay the debt: but an acknowledgment by an executor or administrator, cannot be held to be a promise by him to pay the debt.

The case of *Tullock* v. *Dunn* and another executors of *Hanley* (*c*), which came before Lord *Tenterden* about two years before the passing of the Act called Lord *Tenterden*'s Act, was as follows. The declaration contained the usual money counts, stating promises both by the testator and the executors. The defendants pleaded the Statute of Limitations and other matters. The testator died more than six years before the action brought; and both the executors had, within six years, acknow-

(*c*) Ryan & Moody, N. P. C. 416.

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ledged that the Plaintiff's demand of 230*l.* was due, and one of them expressly promised that it should be paid. The other had made no such promise. Lord *Tenterden* nonsuited the Plaintiff, saying that the only count on which the Plaintiff could pretend to recover, was on the account stated and promise to pay by the executor; that, as against an executor, an acknowledgment merely was not sufficient to take the case out of the statute; but there must be *an express promise*; that the promise by one only, was not enough to entitle the Plaintiff to recover; but there must be a promise by both. The good sense of the rule laid down, by Lord *Tenterden*, in *Tullock* v. *Dunn*, is evident: for, if an acknowledgment of a debt were held to bind an executor, the consequence would be that it would bind him after he had parted with all the assets. *Atkins* v. *Tredgold* (*d*).

Besides, the entry in the account which has been relied on by the counsel on the other side, was simply an acknowledgment of the debt, unaccompanied by any promise, and made in a proceeding to which the person who now seeks to avail himself of it, was not a party. The proceeding in which it was made, was *res inter alios acta*. Moreover it is ambiguous. How do you identify the note mentioned in it, with the note referred to in the bill: and how do you identify the *Phœbe Smith* mentioned in the account, with the *Phœbe Smith* whom the Plaintiff represents? What judicial ground is there for saying that this note is included in the debts and not in the claims?

We trust that, on the authority of *Tullock* v. *Dunn*, the bill will be dismissed; but, if the Court thinks

(*d*) 2 Barn. & Cress. 23.

that there is any thing to be investigated, then we insist on our right to defend ourselves, at law, against a legal demand: more especially as the acknowledgment is of a dubious nature; in which case it has been always held to be the province of a jury to draw the inference as to the nature of the acknowledgment. *Lloyd* v. *Maund* (*e*).

Mr. *Jacob*, in reply, said that the account was rendered, to the Consistory Court, in 1832; and, therefore, the Plaintiff was then able to state the amount of principal and interest due on the note; that it was put in, by the Defendant, as showing how he meant to administer the assets; that the entry in the account was an acknowledgment made, not to a stranger, but to the Judge of the Ecclesiastical Court, for the benefit of all persons interested in the estate who were or might be suitors in the Court; and that it amounted to a promise to pay the debt, in case there should be a sufficiency of assets; that the decision in *Tullock* v. *Dunn* had reference, merely, to the particular form of pleading adopted in that case.

The VICE-CHANCELLOR:

The only question is whether I ought, in this case, to direct the usual accounts to be taken of the intestate's estate. That depends upon the question whether the entry in the account which the Defendant rendered to the Consistory Court of *Lichfield*, was a sufficient acknowledgment of the debt, by the Defendant, to take it out of the operation of the Statute of Limitations.

The Defendant having been called upon, in the Consistory Court, to give a statement of the intestate's

(*e*) 2 T. R. 760.

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assets and of the demands upon them, carried into that Court two documents, one of which is the exhibit marked A., and the other, the exhibit marked B. The exhibit A. is intituled: "A true, full, perfect, and particular inventory of all and singular the goods, chattels, and credits of *James Poole*, late of *Finney Green*, in the parish of *Keel*, in the county of *Stafford*, gent., deceased, which have, at any time since his death, come to the hands, possession or knowledge of *Daniel Poole*, the administrator of the goods and personal estate of the said deceased, made and given in by virtue of the corporal oath of the said *Daniel Poole*." It sets forth the particulars of the assets, both got in and outstanding. The amount of the former is 2,601 *l.*, and the amount of the latter is 803 *l.*, besides 794 *l.*, the estimated value of a steam-engine which belonged to the intestate. The exhibit B. is headed thus: "A true, full, and particular account of all payments and disbursements necessarily made and paid by *Daniel Poole*, the administrator of the estate and effects of *James Poole*, the party deceased, on account of debts due and owing from the said deceased and other expenses connected with the administration of his personal estate and effects, exhibited and given in by virtue of the corporal oath of the said *Daniel Poole*." It contains, first, an account of the expenses of the deceased's funeral, and of procuring letters of administration to his estate and of certain expenses which the defendant had been put to; and the total amount of them is 412 *l.* Next it contains a list of payments made, by the Defendant, in discharge of debts, rent, taxes and wages due from the deceased; the amount of which is 3,577 *l.* Then it sets forth an account of sums retained, by the Defendant, on account of debts due to him from the deceased, amounting to 1,166 *l.* Then it proceeds

thus: "This exhibitant further declares that there are still outstanding and owing the following sums and claims against the estate of the said deceased, from the several persons undermentioned." Then follow several items, amounting, together, to 914*l.*, amongst which are the following: "Executors of the late *Phœbe Smith*, on note, 200*l.* Interest thereon from the 1st of October 1823 to the 1st of April 1832, 85*l.*" Next come five or six items, each commencing with the words: "Amount claimed;" and they amount to 5,884*l.* Then follows the Defendant's signature.

It appears to me, on the face of this document, that no human being can fail to distinguish the claims, nor can any one reasonably doubt that the note mentioned in the bill, is the note alluded to in the account. I have then distinct evidence that, in 1832, the party now sued, admitted that the debt on which the present suit is founded, was then due.

It was said that the question in this case being a question of fact, it ought to be submitted to the decision of a jury: but I see no necessity for taking that course. This Court is in the habit of deciding questions of fact every day.

From the expressions used by Lord *Tenterden* in *Tullock* v. *Dunn*, I think that his Lordship must have considered that what was proved, in that case, as an acknowledgment of the debt by both the executors, did not amount to evidence of a promise, by both of them, to pay the debt: but here I have the case of a clear written acknowledgment of the debt made by a sole personal representative, and signed by him: and, therefore, I think that I ought to make the common decree in a creditor's suit.

1841: 26th and 27th February.

Legacy. Statute of Limitations, 3 & 4 Will. 4, c. 27.

An executor who had possessed assets sufficient to pay a legacy, died leaving it unpaid, and having charged his real estates with his debts. The right to sue for the legacy as such, was barred by lapse of time. Held that it could not be claimed under the charge of debts.

PIGGOTT *v.* JEFFERSON.

A TESTATRIX who died in 1808, gave a legacy of 200*l.* to Mrs. *Piggott*, the daughter of General *Jefferson*, and appointed the General her executor and residuary legatee. Mrs. *Piggott* came of age in 1815. Her father possessed assets of the testatrix sufficient to pay the legacy, and died in 1824, having, by his will, charged his real estates with payment of his debts. Mrs. *Piggott* died in 1838, without having been paid her legacy. Her personal representative now claimed it, with interest from a year after the testatrix's death, *as a debt* due from the General and payable out of his real estates, under the charge contained in his will, his personal estate being insufficient to pay it.

Mr. *Knight Bruce* and Mr. *Shadwell* for the Plaintiff.

Mr. *Russell* and Mr. *Bacon*, for the Defendant, contended that, as Mrs. *Piggott* was capable of giving a discharge for the legacy in 1815, when she attained 21, the Plaintiff's claim was barred by 3d & 4th Will. 4th, c. 27, sect. 40, which enacts that no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, *or any legacy*, but within 20 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless, in the mean time, some part of the principal money or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in

writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and, in such case, no such action or suit or proceeding shall be brought but within 20 years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

Mr. *Knight Bruce*, in reply, said that the charge of debts in General *Jefferson's* will, created a trust, and that no length of time would bar a trust.

The VICE-CHANCELLOR:

I think that the Plaintiff's demand is barred by length of time.

Taking it to be now admitted that General *Jefferson* possessed assets of the testatrix sufficient to pay the legacy, the Plaintiff must, in the first instance, show his right to sue for payment of it, as a legacy, out of the testatrix's personal estate. By the 40th section of the Act of Will. 4th, the 20 years began to run from the time when Mrs. *Piggott* attained 21, which was in 1815; and if the right to sue for the legacy, is barred by lapse of time, how can you revive that right in another form? By possessing assets of the testatrix, General *Jefferson* became liable to pay the legacy, that is, he became, in a certain sense, a debtor to the legatee for the amount of it; but you can not say that he or his estate continues liable, unless you show that the party claiming the legacy, has come in time to demand it out of the assets possessed by him. You can not, by treating him as a debtor, prolong the time for claiming the legacy. Consequently, the claim made by this bill, can not be sustained.

WILSON *v.* BEDDARD.

1841: 26th and 27th February, 1st March, and 15th April.

New trial. Issue devisavit vel non. Heir.

An heir at law is not entitled, as a matter of course, to have a second trial of an issue *devisavit vel non.*

Will. Signature. Execution.

If a testator, who is unable, from illness, to sign his will, has his hand guided in making his mark, it is a sufficient signature within the Statute of Frauds.

ON the trial of an issue *devisavit vel non*, directed in a suit to establish a will, the jury found in favour of the will. A motion for a new trial was now made, on behalf of the Defendant *Richard Powell Williams*, the husband of *Mary Williams* the testator's heiress at law, on whose application the issue had been granted. The testator died in September 1826. The will was made the day preceding his death and when he was extremely ill. He signed it, not with his name but with his mark; in doing which his hand was guided. The depositions of two of the attesting witnesses taken in the suit, tended to impeach the testator's competency. Those witnesses having died, their depositions were read at the trial.

The motion was supported on the above grounds, and also on the ground that no medical persons had been examined as to the testator's competency. It was further alleged that there was a misdirection and omission in the summing up of the learned Judge who tried the issue; and that, in a case like the present, where the inheritance was to be bound, it was a matter of course to direct a second trial, if the heir or a person claiming under him applied for it.

On the other hand, it appeared that Mr. and Mrs. *Williams* had acquiesced in the will for several years after the testator's death.

Mr. *Knight Bruce* and Mr. *Bethell*, in support of the motion, cited Lord *Darlington* v. *Bowes* (*a*); *Sherborne*

(*a*) 1 Eden, 270.

v. *Naper* (*b*); *Matthews* v. *Warner* (*c*); *Pemberton* v. *Pemberton* (*d*); *Winchilsea* v. *Wauchope* (*e*); *Tatham* v. *Wright* (*f*); *Slaney* v. *Wade* (*g*); *Locke* v. *Colman* (*h*); *Gibbs* v. *Hooper* (*i*); *Cleeve* v. *Gascoigne* (*k*); *Stace* v. *Mabbot* (*l*); *Edwin* v. *Thomas* (*m*); *Attorney-general* v. *Montgomery* (*n*); *Warden &c. of St. Paul's* v. *Morris* (*o*); *O'Connor* v. *Malone* (*p*).

Mr. Serjeant *Talfourd*, Mr. *Jacob* and Mr. *Armstrong*, in opposition to the motion, contended that the granting of a new trial of an issue *devisavit vel non*, was not a matter of course, but rested in the discretion of the Court. They cited *White* v. *Wilson* (*q*), *Bootle* v. *Blundell* (*r*), *Lorton* v. *Lord Kingston* (*s*), and *Locke* v. *Colman* (*t*), where Lord *Cottenham* says: "In this Court it is matter of discretion whether any second trial shall be had."

Mr. *Knight Bruce*, in reply, said that there was no case in which a new trial of an issue *devisavit vel non* was asked for by the heir and refused by the Court, except *White* v. *Wilson*: that that case was decided by Lord *Erskine*, who was not familiar with the principles and practice of the Court: that, in *Bootle* v. *Blundell*, the heir gave up the case: that, in *Locke*

(*b*) 2 Ridg. P. C. 224.
(*c*) 4 Ves. 186.
(*d*) 13 Ves. 290.
(*e*) 3 Russ. 441.
(*f*) 2 Russ. & Myl. 1.
(*g*) 1 M. & Cr. 338.
(*h*) 2 M. & Cr. 42.
(*i*) 2 M. & K. 353.
(*k*) Amb. 323.
(*l*) 2 Vez. 553.
(*m*) 2 Vern. 75.
(*n*) 2 Atk. 378.
(*o*) 9 Ves. 169.
(*p*) 1 Maclean & Robinson's Rep. (Irish) 468.
(*q*) 13 Ves. 87.
(*r*) 19 Ves. 494.
(*s*) 5 Clar. & Finn. 269.
(*t*) 2 Myl. & Cr. 42; *see* also ibid. 635.

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v. *Colman*, Lord *Cottenham*, in the passage that had been referred to, was speaking of issues which it was in the discretion of the Court either to grant or to refuse: that, in ordinary cases, such as questions of legitimacy, the Court might decide without directing an issue; but an heir had a right *to demand* an issue to try the validity of a will by which he was disinherited, notwithstanding the will had been clearly proved by evidence taken in the suit: that the object in directing an issue *devisavit vel non*, was not, as in other cases, to inform the conscience of the Court; for the conscience of the Court had nothing to do with it: that what distinguished the issue *devisavit vel non* from all other issues whatever, was that this Court had no power, by itself, to declare what was the will of an individual, but was enabled so to do in consequence only of what had taken place in a Court of Law: that the heir had a right to have the will considered with reference, exclusively, to what had passed in the Court of Law; and this Court had no power to look either at the pleadings or the evidence in the cause, or at anything whatever which had not been before the jury: that the present case was a very doubtful one; and, therefore, the Court ought not to refuse a new trial of the issue, even if it had power so to do.

The VICE-CHANCELLOR:

15th April.

This case came before me on a motion for a new trial of an issue *devisavit vel non*.

It appears that a person of the name of *John Parker Wilson* made a will, (or is said to have made a will,) dated the 7th of September 1826, and died the following day, leaving *Mary* the wife of *Richard Powell Williams*, his heiress at law. The will was made on the day before

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he died, and when he was extremely ill. The three witnesses to it were Mr. *Wood*, an attorney who prepared it, *Durant*, a boy 14 years of age, and a person of the name of *Noake*. The will was signed with the deceased's mark, and not with his name. The nature of it was this, that, with respect to the real estate in question, there was a devise to the testator's nephew, *John Wilson Williams*, (who was the only child of *John Powell Williams* and *Mary* his wife,) with an executory devise over to the Plaintiff, on the nephew dying under 25, without leaving issue who should attain 21. It appears that, on the 2d of October 1826, some agreement was made between the parties, the effect of which was that *John Powell Williams* was to have a lease of a portion of the estate, at the yearly rent of 87 *l.*; and it also appears that Mrs. *Williams*, the heiress at law, was in the house of the deceased when his will was made, and that there was no dispute whatever about it, so long as her son, the younger *Williams*, lived. He died, in 1830, under 21 and without issue. In 1831, the bill was filed, by Mr. *Wilson*, to establish the will. As a matter of course, the witnesses to the will were examined in the cause. Mr. *Wood*'s evidence was in favour of the will. *Durant* deposed that he did not think that the testator was competent to make a will; and *Noake* stated to the same effect. Under these circumstances, the only order that could be made at the hearing of the cause, was an order for an issue *devisavit vel non*, and an order to that effect was made accordingly. The issue was tried, before Mr. Baron *Parke*, at the last summer assizes for the county of *Stafford*; and the jury found in favour of the will. A motion was then made, before me, for a new trial of the issue.

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In support of the motion, it was said, in the first place, that, in a case where the inheritance is to be bound and a bill is filed to establish a will, it is almost a matter of course, although the verdict is in favour of the will, that there should be a second trial. In the second place, it was said that there was a misdirection in what the learned Judge said with respect to the conduct of Mrs. *Williams*, the heiress at law. In the last place, it was contended that the law was wrongly laid down, by the Judge, that the signature of a testator is good, where his hand is guided by another person.

With regard to the first ground, I think that there is no foundation for it. It is true that, in the earlier cases, a strong disposition was manifested to favour the heir; but that tendency has not been pursued in the later cases. In *White* v. *Wilson* it was not so. All that I collect from that case is that the *Lord Chancellor* of the day said that he should be sorry to find a rule, in this Court, that there must be a second trial of an issue, if desired, whether the Court was satisfied with the verdict or not. Allusion was also made to something that fell, from Lord *Eldon*, in *Pemberton* v. *Pemberton*. I do not, however, understand that his Lordship meant to say that, on an application for a new trial, the Court is not to consider all the circumstances of the case; and I understand, from what Lord *Cottenham* laid down in *Locke* v. *Colman*, that the Court ought to look at all the circumstances of the case and see whether they warrant the Court in granting the new trial. I am of opinion, therefore, that, in the case now before me, I ought not blindly to direct a new trial, merely because it is asked for.

Next: with respect to what fell from the learned Judge at the trial.

[His *Honor* here read, from the short-hand writer's notes of the summing up to the jury, a passage relating to the acquiescence in the will on the part of Mrs. *Williams*; and said, that although it might not be quite correct in point of law (Mrs. *Williams* being a *feme coverte*), yet, the learned Judge might have stated the case to the jury much more forcibly than he had done, if he had impressed on their minds the taking of the lease by Mr. *Williams*, and certain declarations which he had made. His *Honor* then said:]

I am of opinion however that, for the purpose of determining whether a new trial ought or ought not to be granted, I am at liberty to look not only at the facts which were presented to the jury, but also at the facts which might have been, but were not presented to them.

Next, it was contended that what the learned Judge said with reference to the testator's hand being guided when he made his mark to his will, was not law. The Judge said that it was necessary that the will should be signed by the testator, not with his name, for his mark was sufficient if made by his hand, though that hand might be guided by another person: and, in my opinion, that proposition is correct in point of law. For the Statute of Frauds requires that a will should be signed, by the testator or by some other person in his presence and by his direction: and I wish to know, if a dumb man, who could not write, were to hold out his hand for some person to guide it, and were then to make his mark, whether that would not be a sufficient signature of his will. In order to constitute a direc-

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tion, it is not necessary that any thing should be said. If a testator, in making his mark, is assisted by some other person, and acquiesces and adopts it; it is just the same as if he had made it without any assistance. It is observable too, that, before the mark was made, the testator made some faint strokes on each of the sheets. My opinion, therefore, is that the observation made, by the learned Judge, on this part of the case, was quite correct in point of law; and therefore, it affords no ground for granting a new trial.

Then, with respect to the remaining circumstances of the case; I mean the evidence of the attesting witnesses. Two of them died before the trial, but their depositions were laid before the jury. I have always thought that, if any attention at all ought to be paid to the testimony of witnesses who deny a solemn act which they have attested, it ought to be the slightest possible. Perhaps the best way would be to disregard it altogether. And I confess that my mind is very little affected by their evidence. If the testimony of *Wood* is to be believed, as I think it is, there is no fault whatever to be found with the finding of the jury; and, consequently, I shall refuse the motion for a new trial.

If the motion had been made merely on the ground that the heir had a right to have a second trial, I should have refused the motion without costs, as was done in *White* v. *Wilson*; but as statements have been made in the affidavits, tending to discredit the testimony of *Cooper*, who was one of the Plaintiff's witnesses at the trial of the issue, and as it appears that no credit ought to be given to those statements, I shall refuse the motion with costs.

CROSSE *v.* BEDINGFIELD.

1841: 1st and 2d March.

Evidence. Declarations.

Bill by the obligee in a bond, who had delivered it up, by mistake (as he alleged) to one of the co-obligors, to recover the amount due on it. The joint answer of the co-obligors admitted the delivery of the bond, and that one of them had destroyed it; but traversed the allegation as to mistake. Held that declarations made by the obligor to whom the bond had been delivered, tending to prove the Plaintiff's allegation, were admissible against the co-obligor.

IN May 1818, *T. Bayly*, a medical practitioner, agreed to take *James Bedingfield* into partnership with him for a premium of 500 *l.*, and to retire from business at the end of five years, in consideration of *Bedingfield* paying him an annuity of 50 *l.* for his life. *Susan Bedingfield*, the mother of *James Bedingfield*, gave *Bayly* her promissory note for securing the payment of the premium by instalments. *Bayly* retired from business a few months before the five years expired, and, thereupon, *J. Bedingfield* and his mother gave *Bayly* their joint and several bond, dated the 31st of August 1822, in the penalty of 500 *l.*, for securing to him the annuity. No payment was made in respect of the annuity after the 11th of November 1824. In November 1825 Mrs. *Bedingfield* called on *Bayly* and paid him the last instal-

Lost instrument.—Affidavit.—Practice.

Bill by the obligee in a bond, who had delivered it up, by mistake (as he alleged), to the Defendant, the obligor, to recover the amount due on it. The answer admitted the delivery of the bond, and that the Defendant had destroyed it, but traversed the allegation as to mistake. Held, at the hearing, that, as the answer admitted the bond to have been destroyed, the Court had jurisdiction; notwithstanding there was not annexed to the bill an affidavit that the bond was lost or not in the Plaintiff's custody.

Interest.—Annuity.

Payment decreed of the arrears of an annuity secured by bond, with interest; not exceeding, however, in the whole, the penalty of the bond.

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ment of the premium: and then he, intending, as it was alleged, to give her the promissory note, gave her the bond, and told her to burn it when she got home; which she accordingly did.

On the 11th of March 1834, *Bayly* died; and, in June 1837, the bill was filed, by his personal representative, against *James* and *Susan Bedingfield*, alleging that *Bayly* gave the bond to *Susan Bedingfield*, by mistake, instead of the promissory note; and praying that, if not destroyed, it might be delivered up to the Plaintiff; or that the Defendants might pay, to him, the arrears of the annuity with interest.

James and *Susan Bedingfield* put in a joint and several answer, stating that *Bayly* delivered the bond, to the latter, on the occasion before mentioned, and said, emphatically and with a peculiar meaning in the expression of his countenance: "Mrs. *Bedingfield*, as soon as you get home, burn this;" and that, immediately on her return home, she did, accordingly, burn the bond, in the full persuasion that *Bayly* had determined to perform a just act, and to relieve herself and her son from the payment of the annuity, to the granting whereof they had been induced by *Bayly*'s having represented the business to be more profitable than it really was: that the bond, being a paper of considerable size and indorsed on the back, could not, by any reasonable possibility, have been mistaken by *Bayly*, in the open way in which the same was delivered by him to her, for a promissory note: that, a few days after *Bayly* had delivered the bond to her, he and his solicitor, *W. Ransom*, called upon her, and, to her great surprise, pretended that the bond had been given to her by mistake, and requested her to give another in its place; to which

request she refused to accede: that, she never informed her son of the delivering up and destruction of the bond, *until some time in the year* 1836.

In support of the bill, Mr. *Ransom* deposed as follows: that, in November 1825, *Bayly* informed him that, having had occasion, recently, to search amongst his papers, he had found, to his great surprise, Mrs. *Bedingfield*'s note of hand, which ought to have been given to her when she paid him the last money due upon it, and that, upon searching for her annuity-bond, he was not able to find it, and was, therefore, apprehensive that he had given it to her, by mistake, instead of the note. In consequence of which, *Ransom*, at *Bayly*'s request, called with him upon Mrs. *Bedingfield*, on or about the 15th of November 1825, and *Bayly* then requested her to let him see the paper which he had delivered to her upon the occasion of her paying him the last instalment of the premium. To which request Mrs. *Bedingfield* made answer that she could not do so, as she had burnt it. Whereupon *Bayly* said he was sorry to hear her say so, as that paper was the annuity-bond which he had delivered to her, by mistake, instead of her note of hand: that Mrs. *Bedingfield* then declared that, immediately on her return home, she had thrown it into the fire, and burnt it, without looking at it, under the impression that it was the promissory note, adding that, if she had been aware that it was the bond, she would have returned it: that, upon her saying this, *Bayly* requested her to remedy the mistake by executing another bond; but which she declined doing. A letter also of the 3d of December 1825, from Mrs. *Bedingfield* to *Ransom*, was proved. It contained the following passage: "Since you and Mr. *Bayly* called upon me, I have reflected on the business, and I con-

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sider that the destruction of the bond *was an accident*: and, as I should be sorry Mr. *Bayly* should be a sufferer *by the mistake*, I shall never, directly or indirectly, mention the affair to my son: therefore *the annuity is as secure as ever*." Another letter also was proved from Mrs. *Bedingfield* to *Ransom*, dated the 5th of January 1826, in which she acknowledged that she had received the promissory note, which he had sent to her by *Bayly's* desire.

At the hearing of the cause, Mr. *G. Richards* and Mr. *Pitman*, for the Defendants, said that the acts or the declarations of one obligor, were not evidence against a co-obligor, and, therefore, the evidence above mentioned, was not admissible as against *James Bedingfield*.

Mr. *Knight Bruce* and Mr. *Koe*, for the Plaintiff:—

The bond is proved to have existed, and the answer admits the fact of its destruction; then the declarations of one of the co-obligors as to the circumstances of its destruction, become admissible against the other co-obligor. *Gilb. Ev.* edit. 1769, p. 57: *Whitcomb* v. *Whiting* (*a*); *Perham* v. *Raynal* (*b*); *Wyatt* v. *Hodson* (*c*); *Burleigh* v. *Stott* (*d*); *Pritchard* v. *Draper* (*e*); *Nottidge* v. *Prichard* (*f*); *Jackson* v. *Fairbank* (*g*); *Saltern* v. *Melhuish* (*h*).

Mr. *G. Richards*, in reply:

Declarations by one of several persons mutually interested, are admissible when authorised by the nature

(*a*) Doug. 652.
(*b*) 2 Bing. 306.
(*c*) 8 Bing. 309.
(*d*) 8 Barn. & Cres. 36.
(*e*) 1 Russ. & Myl. 191.
(*f*) 8 Bligh, 493.
(*g*) 2 H. Black. 340.
(*h*) Ambl. 247.

of the joint interest, as in the familiar instance of partners: but, here, the act of one obligor is tortious and unauthorised by the joint interest.

The VICE-CHANCELLOR:—

It is not necessary to enter into the question, how far the declaration of one obligor, as to an act said to be tortious, would be evidence against a co-obligor.

Put this case: a bond is lost, without saying anything about destruction; but it is out of the Plaintiff's possession and he cannot get it. Suppose one co-obligor says: "I admit it is in my possession:" would not the Court have jurisdiction to make a decree against that obligor? It would be singular if the Court should have the power to make a decree against the one and not against the other, when the liability, if it exists at all, is joint. I cannot see why, in such a case, a decree should not be made against both.

The answer represents that the bond is destroyed, but says that it was destroyed under other circumstances than those alleged by the bill. There may be a set of circumstances stated, as to that, by the bill, which, in the Defendant's view, it may be very material to traverse. But still the joint and several answer admits the destruction, though it represents that it took place under circumstances different from those stated by the bill. But, if the destruction is admitted to have happened in any manner, the Court has jurisdiction, and the evidence ought to be admitted against both the obligors.

Another objection made for the Defendants, was that, as the only ground for the Plaintiff's suing in a Court of Equity was that the bond had been destroyed, he

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ought to have annexed, to his bill, an affidavit of that fact, or, at all events, that the bond was not in his custody. In support of that objection, the following authorities were cited: *Mitf. on Plead.* 4th edit., pages 54 & 124; *Whitchurch* v. *Golding* (*i*); *Walmsley* v. *Child* (*k*); *East India Company* v. *Boddam* (*l*); *Anon.* (*m*); *Whitfield* v. *Fausset* (*n*); *Mossop* v. *Eadon* (*o*); *Macartney* v. *Graham* (*p*); *Hansard* v. *Robinson* (*q*); *Dormer* v. *Fortescue* (*r*).

The VICE-CHANCELLOR:—

The answer admits the destruction of the bond. All that it disputes is the circumstances under which it was destroyed. If the answer admits the destruction to have taken place, no matter how, the Court has jurisdiction; and, therefore, the objection for want of the affidavit, must be over-ruled.

The objections having been over-ruled, the hearing of the cause was proceeded with; and, finally, his *Honor* pronounced a decree declaring that the Plaintiff, as *Bayly*'s executor, was entitled, by virtue of the bond, to an annuity of 50 *l.*, and ordered an account to be taken of the arrears of the annuity *with interest at* 4 *l. per cent.**; and the amount to be found due for principal and interest (not however exceeding the penalty of the bond) to be paid by the Defendants to the Plaintiff.

* See *Jeudwine* v. *Agate*, *ante*, Vol. III. p. 129; *Hyde* v. *Price*, *ante*, Vol. VIII. p. 578; and 3 & 4 Will. 4, c. 42. The minutes of the decree contained no direction for the computation of interest: probably, because the arrears alone, exceeded the penalty of the bond.

(*i*) 2 P. W. 541.
(*k*) 1 Vez. 341.
(*l*) 9 Ves. 464.
(*m*) 3 Atk. 17.
(*n*) 1 Vez. 387.
(*o*) 16 Ves. 430.
(*p*) *Ante*, Vol. II. 285.
(*q*) 7 Barn. & Cres. 90.
(*r*) 3 Atk. 132.

GOODMAN *v.* COOMBES.

1841: 8th March.

Practice. Revivor.

After decree, the Plaintiff died; and one of the Defendants filed a bill of revivor against his executors, but, for several months, neglected to obtain an order to revive. The Court gave the executors liberty to revive the suit, if the Plaintiff in the bill of revivor, should not revive it within a week.

ON the 29th of September 1839 and after decree, *W. Slade*, the Plaintiff in the original suit, died. On the 7th of March of 1840, *Goodman*, one of the Defendants in that suit, filed a bill of revivor against his executors and the other surviving parties to the original suit, but did not obtain an order of revivor. In consequence of which,

Mr. *Bagshawe*, for *Slade*'s executors, obtained an order, on the 21st of January 1841, on the authority of an unreported case, *Gordon* v. *Bertram*, Reg. Lib. A. 1815, fo. 370 and 497, that *Goodman* should obtain an order to revive within a week after the service of the order to be made on the motion, or that the Defendants, *Slade*'s executors, should be at liberty to draw up the order.

On the 8th of March, *Goodman* not having obtained the order,

The *Vice-Chancellor*, on the application of Mr. *Bagshawe*, ordered the suit to be revived.

Reg. Lib. A. 1840, fo. 271 and 501.

1841:
5th March.

STAMMERS *v.* HALLILEY.

Will. Construction. Legacy. Priority.

Testator gave legacies to trustees, in trust for his daughters for their separate use for their lives, and, after their deaths, for their children. By a codicil, after reciting that he had settled, on his daughters, fortunes which he was satisfied his property would allow of being increased, he gave, to each of them, 500 *l.*, which he directed not to be settled, but to be paid to them. By a second codicil, he gave, to his wife, 3,000 *l.* in lieu of 1,000 *l.* which he had given her by his will. His property proved insufficient to pay the legacies in full. Held that the legacies given by the first codicil, were postponed to the legacies given, to the daughters, by the will, and also to the legacy given to the wife, by the second codicil.

THE bill in this cause was filed by *Martha*, the wife of the Defendant *Joseph Stammers*, by her next friend, on behalf of herself and all other the unsatisfied pecuniary legatees of *John Halliley*, her late father.

The testator, by his will, dated the 1st of June 1827, gave to his wife, *Sarah Halliley*, the sum of 1,000 *l.* in lieu of dower, and the sum of 4,000 *l.* to trustees, in trust for the Plaintiff's separate use for life, and, after her decease, in trust for her children; and he gave sums of the same amount upon like trusts for the benefit of his four other daughters and their children. By a codicil dated the 28th of January 1828, after reciting that, by his will, he had given to or settled, upon his five daughters, fortunes in money, *which he was satisfied his property would allow of being increased*, he gave, to each of them, the sum of 500 *l.*, and directed it to be paid to them, with interest at 5 *l.* per cent., without being settled on them, by two equal instalments, one at the expiration of one year, and the other at the expiration of two years after his death. The testator made another codicil, dated the 29th of May 1828, by which, after reciting that he had, by his will, given, to his wife, a legacy of 1,000 *l.*, he revoked that legacy, and bequeathed to her a legacy of 3,000 *l.* in lieu of it.

The testator died on the 16th of August 1828. His assets having proved insufficient to pay the legacies

given by his will and codicils, in full, one question in the cause was whether the legacies given by the first codicil were to be postponed to those given by the will.

Mr. *Jacob* and Mr. *Prendergast* for the Plaintiff, and

Mr. *Knight Bruce* and Mr. *Elmsley*, for Defendants in the same interest, said that as the testator, in the codicil in which he gave the additional legacies to his daughters, had expressed his satisfaction that his property would allow of the fortunes which he had provided for them by his will, being increased, he had declared, in effect, that he did not intend those additional legacies to be paid, unless his property should be more than sufficient to pay the legacies given by the will, in full. They relied on *The Attorney-general* v. *Robins* (*a*).

Mr. *Girdlestone* and Mr. *Goulburn*, for the Defendant, *Joseph Stammers*, contended that the legacies given by the will and those given by the codicils, were to be paid *pari passu*. They cited *Beeston* v. *Booth* (*b*), and *Blower* v. *Morret* (*c*), and added that the passage in the first codicil which had been relied on by the Plaintiff's counsel, expressed nothing more than what was in the mind of every testator and was the natural inference from the act of giving legacies; for every testator was satisfied that his property would be fully sufficient to pay all his legacies: that the language of the testator in *The Attorney-general* v. *Robins*, differed, materially, from that used by the testator in the present

(*a*) 2 P. W. 23. (*b*) 4 Madd. 161.
(*c*) 2 Vez. 420.

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case; for, there, the testator said merely that he *apprehended* that there would be a surplus of his personal estate; so that he expressed a doubt upon the subject, and it was to be inferred that he had given the further legacies with reference to that doubt; but, in the present case, the testator said that he was *satisfied* that his property would be more than sufficient to pay the legacies given by his will: that, at all events, there was no ground whatever for contending that the legacy of 3,000*l.* given by the second codicil, was to be paid in priority to the legacies given by the first codicil.

The VICE-CHANCELLOR:

I have read through the will and codicils, and I can not say that I see any substantial distinction between this case and the case of *The Attorney-general* v. *Robins*.

It is observable that, in that case, the M. R. says that the legacies at the latter end of the will, were given on the presumption that there would be a surplus; and, afterwards, he says that the codicil must be taken as part of the will. But, in the codicil, the testator provides for there being a deficiency; which does not show that he had a very strong presumption or apprehension that there would be a surplus.

However, that case is so like the present that, unless it involves some clear violation of principle (which I do not think it does) I must be bound by it.

Here the second codicil does not increase the fund, nor does it show that the testator had altered the view which he took of the amount of his property when he made his first codicil. Indeed the second codicil con-

firms * the first, as it stood at the time, that is, with the expression of satisfaction in it. Therefore, if there is any distinction between this case and *The Attorney-general* v. *Robins*, this case is the stronger one for holding that the legacies given by the first codicil, are postponed to those given by the will, and also to the 3,000*l.* given by the second codicil.

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STAMMERS v. HALLILEY.

* The second codicil, as set forth in the brief, with which alone the Reporter was furnished, contained no express confirmation of the first.

UPTON *v.* SOWTON.

1841: 8th March.

Practice. Answer.

A Plaintiff having died before the Defendant had answered, his representative filed a bill of revivor and supplement, praying that the Defendant might answer it and also the original bill. The Defendant put in an answer which was intituled as his answer to the original bill of the Plaintiff, "since deceased." The answer was ordered to be taken off the file.

BEFORE the Defendant had answered the original bill, the Plaintiff died. His personal representative then filed a bill of revivor and supplement, praying that the Defendant might answer it and also the original bill. After the suit had been revived, the Defendant put in an answer, which he intituled as his answer to the original bill of the Plaintiff, "*since deceased.*" Mr. *Lowndes* now moved that the answer might be taken off the file, for irregularity. He said that no indictment for perjury could be sustained upon it. He also referred to *Vigers* v. *Lord Audley* (*a*).

Mr. *Renshaw, contra,* said that the answer stated, in the body of it, that the suit had been revived. He cited *Sayle* v. *Graham* (*b*).

(*a*) *Ante*, Vol. IX. p. 408. (*b*) *Ante*, Vol. V. p. 8.

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UPTON v. SOWTON.

The *Vice-Chancellor* said that a Plaintiff had a right to have an answer rightly intituled; that the answer which had been filed, purported to be an answer in a suit which had wholly abated, and therefore, the title was wrong. But, as the second suit was described, in the notice of motion, to have been commenced by bill of revivor only and not by bill of revivor and supplement, His *Honor* made the order without costs.

1841: 9th March.

Practice. Injunction. Impertinence. Answer.

Exceptions to an answer for impertinence can not be shown as cause against dissolving a special injunction.

SIMEON *v.* DAVIS.

AN injunction had been obtained *ex parte*. The answer having been filed, a motion was now made to dissolve it.

Mr. *Keene*, for the Plaintiff, showed exceptions taken to the answer for impertinence, as cause against dissolving the injunction. He cited *Raphael* v. *Birdwood* (*a*).

Mr. *Jacob*, for the Defendant, said that exceptions to an answer, whether taken for impertinence or for insufficiency, could not be shown as cause against dissolving a *special* injunction: that, in the case cited the injunction, though said to have been special, could have been nothing more than the common injunction which had been extended to stay trial.

The VICE-CHANCELLOR:

Under the new orders of the Court, an answer cannot be referred, generally, for impertinence, but the matter

(*a*) 1 Swanst. 228.

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SIMEON v. DAVIS.

alleged to be impertinent, must be specified by way of exception. Why then may not the answer in this case be taken as an answer, disregarding those parts of it which have been excepted to as being impertinent?

I see no reason why this motion should not be proceeded with.

CASTELLAIN *v.* BLUMENTHAL.

1841: 9th March.

Practice. Affidavits. Injunction.

AN order *nisi* to dissolve the common injunction having been made on the coming in of the answer,

On showing cause against dissolving an injunction, the Plaintiff cannot read affidavits to prove allegations, in the bill, of matters of fact, which the answer neither denies nor admits.

Mr. *Knight Bruce* and Mr. *L. Wigram*, on showing cause against the order being made absolute, tendered an affidavit to prove allegations in the bill as to which the Defendant said he did not know nor could he set forth whether they were true or not. They cited *Morgan* v. *Goode* (*a*), *Hodgson* v. *Dean* (*b*), and an unreported case of *Ord* v. *White* (*c*), before the *Master of the Rolls* in the winter of 1840, in which the question as to the admissibility of affidavits to substantiate allegations in the bill, as to which the answer stated that the Defendant was ignorant, was much discussed; and the *Master of the Rolls*, though he decided the motion independently of the affidavits, yet said that, as the point had been much discussed, he would express his opinion that the affidavits were admissible.

(*a*) 3 Mer. 10. (*b*) 2 Sim. & Stu. 221.
(*c*) Since reported in 3 Beav. 357.

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CASTELLAIN v. BLUMENTHAL.

Mr. *Jacob* and Mr. *Bacon, contra,* objected to the affidavits being read, and cited *Barrett* v. *Tickell* (*d*).

The *Vice-Chancellor* said that the opinion of the *Master of the Rolls* was extra-judicial, as he decided the case independently of the affidavits: that a party who moved for an injunction, or showed cause against the dissolution of it on an answer, was bound by the answer: that it had been repeatedly decided, and he considered it as settled that affidavits to prove *facts* as to which a defendant stated he was ignorant, were not admissible, especially in a case like that before him, in which the Plaintiff was showing cause on merits confessed in the answer. His *Honor* added that, in *Hodgson* v. *Dean,* Sir *J. Leach* seemed to think that it was a mere accidental omission to state the fact as to which the affidavit was received.

(*d*) Jac. 154.

TURNER *v.* TRELAWNY.

1841: 10th, 11th, 12th, 13th, and 15th March.

THIS case arose out of the transactions stated in *Turner* v. *Hill*, *Turner* v. *Tyacke* and *Turner* v. *Bor-*

Bankrupt.—Assignee.—Purchase of Bankrupt's Property.—Breach of trust.—Principal and agent.—Laches.—Length of Time.

In January 1820, *A.* and *B.*, who held more than a third of the shares in a *Cornish* mine, which was then a losing concern and the shares were of very little if any value, became bankrupt. At a meeting of the other shareholders, held in February, at which *G.*, though not then a shareholder, was present, it was resolved, in order to prevent the mines from being abandoned and the injury which the neighbourhood would sustain thereby, that a new company should be formed, consisting of old shareholders and of persons who might be inclined to purchase shares in the mine, and that, for the security of the latter, the mine should be sold under a decree of the Court of Stannaries, and the debts of the mine paid with the proceeds. Shortly afterwards, *G.* was appointed assignee of the bankrupts; and then, in order to avoid the responsibility of continuing to hold their shares, he relinquished them under counsel's advice. Afterwards the shares were disposed of amongst old and new adventurers, and *G.*, who had proposed to the trustees for the Defendant, then a minor, to take some of the shares, agreed to take eleven, *for himself and friends*; and about the same time the trustees authorized him to take four shares for the Defendant. The mine was afterwards sold, in the Court of Stannaries, to *G.* on behalf of the new company: The purchase money was paid into Court, and then applied to pay the debts of the mine. Soon afterwards the Defendant came of age; and his agents paid *G.* for the four shares at the rate at which he had purchased the eleven, and the four shares were transferred into Defendant's name. The mine continued to be a losing concern to the new company, until after they had prevailed on Defendant, who was the owner of the freehold, to accept a surrender of the lease under which it had been held, and to grant a new lease *at reduced dues, and including new mining ground.* Afterwards *G.* was removed from the assigneeship, and a renewed commission was issued, under which the Plaintiff was chosen assignee of the bankrupts.

Notwithstanding the term granted by the old lease had long expired, and the Defendant had no knowledge of the bankruptcy, and fifteen years had elapsed during which there had been a large expenditure on the mine, the Court declared the Defendant to be a trustee of his shares in the mine, including the new ground, and decreed him to account for and pay, to the Plaintiff, the profits thereof.

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lase, reported *ante*, Vol. XI. pages 1, 16 and 17. Those cases came before the Court on the argument of demurrers, and, therefore, in the reports of them, the allegations in the bill were stated as facts. This case, however, was brought to a hearing, and therefore it will be necessary to state the facts as they appeared from the evidence in the cause.

In and before 1819, Messrs. *J.* and *T. Gundry* were the owners of more than one-third of the shares in certain mines in *Cornwall*, which were held for terms of years ending in 1831, which had been granted by *George Woolcombe* and *George Leach*, the trustees under the will of the Defendant's late father. At the end of 1819 and the beginning of 1820, the Messrs. *Gundry* were much embarrassed in their circumstances, and were greatly indebted to the mines; and, owing principally to their embarrassments and mismanagement, the mines were a losing concern; and there was reason to apprehend that the working of them must cease.

In the early part of January 1820, the late Mr. *Grylls*, who was a gentleman of considerable influence and property in the neighbourhood, exerted himself to keep the mines in work, as they afforded employment to a great number of labourers, and tended to promote the trade of the neighbouring town of *Helston*. Accordingly, on the 6th of January 1820, he wrote to Mr. *Henry Woolcombe*, the solicitor to the trustees, stating that the mines could not at the then price of tin, be worked so as to do more than pay their expenses, that the trustees must feel the necessity (if they could not give immediate assistance) of promising that the matter should be taken into consideration as soon as the De-

fendant, the tenant in fee under the will (but who was not then quite of age), should attain 21, and that an abatement in the dues payable for the mines would induce the adventurers to continue the working of them with spirit.

On the 20th of January 1820, a commission issued against *Thomas Gundry*, and, on the same day, a commission issued against *John Gundry*, under which they were found bankrupts respectively. On the 24th of the same month, a joint commission issued against them, under which also they were declared bankrupts.

On the 5th of February 1820, a meeting of the adventurers was held, at which *Grylls*, though he had then no interest in the mines, was present; and it was then resolved, as the only measure that could prevent the mines from stopping, that at least one-half of them should be offered for sale at the price of 500*l.* per share; and, in case that one-half could be disposed of at that rate, it was proposed, *for the security of the new adventurers*, that the mines, materials, and halvans should be sold by the decree of the vice-warden of the Stannaries, and entered upon as on the 1st of February then instant, *clear of all debts and demands contracted before that day*; that the amount of shares to be sold to new adventurers, should be paid into the vice-warden's court; that the sum which might be raised from *John Gundry*'s shares should be appropriated to pay the amount due from the mines to the end of October then last; that the old adventurers who should continue their shares, should give an undertaking, to the vice-warden, to pay their proportions of the deficiency which might remain due, from *John Gundry*, after the produce of his shares should have been appropriated as above; that commu-

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nication should be made, to Mr. *Grylls*, respecting the purchase of the half of the mines agreed to be offered for sale, and that he should be requested to correspond with such persons as might be willing to become purchasers thereof, and that the adventurers present at the meeting would endeavour to dispose of some part thereof amongst their friends.

Mr. *Grylls* did not sign these resolutions; but, in consequence of them, he applied to several persons to take shares in the mines; but neither he nor any of the adventurers could then dispose of any of the shares.

On the 15th of February 1820, *Grylls* and *Charles Read* were chosen assignees of *John Gundry*'s separate estate; and the creditors present on that occasion, authorized the assignees to relinquish *J. Gundry*'s shares in the mines, to the other adventurers.

On the 16th of February 1820, another meeting of the adventurers was held, at which also *Grylls* was present; and it was then resolved that the principal creditors of the mines, should immediately petition the vice-warden of the Stannaries for a decree to procure the payment of the sums due to them; and that they should represent, to the vice-warden, at the same time, that there was a great number of other creditors, and request him to appoint a day for the proof of their claims before his secretary, with a view to have a decree for the sale of the mines, materials, and halvans, for the purpose of defraying the whole sum which might be due; that the vice-warden should be then petitioned for a decree to sell the mines &c., in one lot; that the proceeds of the sale should be paid into the vice-warden's court, and be considered in precisely the same situation, with respect to the claims of the creditors, as

the mines &c. would have been if no sale had taken place.

On the 18th of February 1820, *Grylls* and *Read* were chosen assignees of *Thomas Gundry*'s separate estate, and, on the 23d of the same month, they were chosen assignees of *J.* and *T. Gundry*'s joint estate.

On the 18th of that month, *Grylls* and *Read* relinquished, to the continuing adventurers, the shares of both *John* and *Thomas Gundry* in the mines, in order, as the answer alleged, to protect themselves from the future responsibility which they would have incurred, to a great extent, if they, as assignees of insolvent estates, had continued adventurers in the mines, and from which they had no prospect of being otherwise relieved, after the refusal of so many persons to take shares in the mines: for, as the Defendant believed, the produce of the mines did not then pay the expenses thereof, and the debt on them then exceeded the value thereof and of the property belonging thereto.

On the 23d of February 1820, another meeting was held (at which also *Grylls* was present) between the old adventurers and persons who had then proposed to become new adventurers in the mines, for the purpose of coming to an arrangement as to the terms upon which the new adventurers were to take up their shares; and it was then resolved that four persons should be appointed to value the materials, halvans* &c. on the mines, two by the old and two by the proposed adventurers, and that the mines* should be sold at the valuation to be so made; and such of the parties as were old adventurers, agreed to take such additional shares as were set

* So in brief.

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opposite their respective names, and such of them as intended to become adventurers, to take such shares as should be set opposite their respective names: and it was further resolved that immediate measures should be taken to induce the vice-warden to grant a decree for the sale of the mines, in order to pay the debts due in January then last; and that, in case of such sale at the valuation above mentioned or at any higher sum, the purchase money should be paid into the vice-warden's court, and be considered precisely in the same situation with respect to the responsibility of the then adventurers, as the mines, materials &c. would have been in if no such sale had taken place.

Grylls signed these resolutions as taking three shares; and, on the 29th of February, he wrote a letter to *Henry Woolcombe*, as the solicitor to the Defendant's trustees, enclosing the last-mentioned resolutions, and stating that some of the shares which had been relinquished, had been taken; but he despaired of finding persons to take the remaining shares, and that the consequence would be that the working of the mines must stop, which would be very injurious to the defendant's interest and to the neighbourhood.

On the 8th of March 1820, *Grylls* wrote another letter to *H. Woolcombe*, proposing that three shares should be taken for the Defendant. On the 11th of March, *H. Woolcombe* wrote, in answer, that he would desire a person, named *Davey*, to visit the mines, and that, if he recommended the trustees to purchase the three shares, they would do so, provided that *Grylls* could advance the money and not require payment until September then next. *H. Woolcombe* wrote to *Davey* accordingly; and, on the 15th of March, *Davey*'s son answered the

letter for his father (who was absent in *Wales*), saying, that he had shown *H. Woolcombe*'s letter to Captain *William Francis*, who had lately inspected the mines for some gentlemen in the neighbourhood, and that *Francis* thought it was doubtful whether the mines could pay their way, but that it would be advantageous to the lord (meaning the defendant) if it should be the means of continuing the working of the mines, as the dues would more than pay the probable loss on the three shares.

In the interval between the 23d of February and the 22d of March 1820, *Grylls* prevailed on several of the persons, who, by the resolutions of the 23d of February, had agreed to take shares, to take further shares in the mines; and, on the 22d of March, another meeting was held, at which the persons present agreed to take such shares as were set opposite to their respective names on the conditions expressed in the resolutions of the 23d of February; and *Grylls* signed the resolutions of the 22d of March, as taking eleven shares, " for self and friends."

About this time, but when in particular did not appear, *Henry Woolcombe* authorized *Grylls* to take four shares for the defendant.

On the 23d of March, an amicable suit was instituted in the vice-warden's court, by certain creditors of the mines, against several of the adventurers, and also against *Grylls* and *Read* as the assignees of the bankrupts, in pursuance of the arrangement which had been made at the meetings before mentioned.

On the 20th of April 1820, *Grylls*, by the advice of counsel and with the consent of the creditors of the

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bankrupts present at a meeting, relinquished the shares of the bankrupts in the mines and in the materials, halvans and other property belonging thereto, the previous relinquishment of the 18th of February having extended to the mines only. Other adventurers also relinquished their shares in the mines, some at the the same time, and some previously: and one of them, who held four shares, relinquished them in September 1821.

On the 25th of April 1820, the separate commissions against *John* and *Thomas Gundry* were superseded.

On the 9th of May, the suit in the vice-warden's court was heard; and a decree was made directing the mines, materials &c. to be sold for the payment of the debts due to the creditors of the mines. On the 2d of June 1820 *Grylls* was authorized, by the adventurers, to attend at the sale and to purchase the mines &c. on their behalf for 18,000*l.* The sale under the decree was advertised for the 5th of June; but, owing to some misunderstanding, it did not take place until the following day. *Grylls* was the only bidder at it, and the mines were knocked down to him for 18,000*l.* That sum was afterwards paid, in obedience to an order of the Court, into a bank, and applied in payment, as far as it would extend, of the debts due from the mines.

The Defendant attained 21 in June 1820, and, in November following, his agents paid to *Grylls* the price of the four shares which he had purchased for the Defendant; and those shares were then transferred, in the cost-book of the mines, from *Grylls*'s name to the Defendant's. In 1829, *Grylls* and *Read* were removed from being assignees, under an order made in the bank-

ruptcy, and a new commission was issued, under which the Plaintiff and two other persons since deceased, were chosen assignees of the bankrupts' estates. In 1834, *Grylls* died.

The bill, which was filed in September 1835, contained allegations tending to impute fraudulent and improper motives to *Grylls*, in engaging in the transactions above mentioned; and it charged that the mines had been, from the commencement of those transactions and still were, very profitable; and that the eleven shares which *Grylls* had purchased, were part of the shares of the bankrupts; that *Grylls* purchased those shares when he was assignee of the bankrupts, and that the Defendant purchased his four shares, part of the eleven, through the means of *Grylls*, and that *Grylls* purchased those four shares for the Defendant's benefit, having been authorized so to do as before mentioned.

The bill prayed that the Defendant might be declared to be a trustee, of the four shares, for the Plaintiff, and might be decreed to transfer them to the Plaintiff, and to account for and pay to him the profits thereof from June 1820.

The Defendant said, in his answer, that he had not, nor, as he believed, had the trustees of his late father's will or either of them, nor, as he believed, had *Henry Woolcombe*, at or before the time when he took to his four shares, or at or before the time when the purchase money was paid for the same, any notice or information of the circumstances alleged, in the bill, to have attended the sale of the mines, or of any circumstances whatsoever whereby such sale or the title of purchasers under the same, could be impeached, and that he considered the transaction as being the formation of a

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new company of adventurers, the old company being unable to carry on the mines. The answer further stated, and there was evidence tending to show that the mines continued to be a losing concern for a considerable time after the new adventurers became concerned therein; and that they sustained a loss thereby of upwards of 5,000 *l.*; that, from representations made to the Defendant, he was satisfied that, unless he consented to reduce the dues and to grant new setts at reduced dues, including additional mining ground, the mines could not be carried on and would be abandoned; wherefore he agreed to grant and did, in December 1821, grant new leases or setts to the adventurers, by which not only reduced dues were reserved to him, but additional mining ground was granted; that, on the granting of the new leases or setts, the former ones, which would have expired in March 1831, were delivered up, and that, in consequence thereof and of discoveries which had been made of valuable tin and copper ore, *the mines comprised in the new setts* (in the working of which and in making the discoveries therein, considerable expenses had been incurred by the new adventurers) had, since July 1822, become productive and profitable: but the Defendant believed that the loss which he had sustained by reducing the dues reserved to him by the old setts, greatly exceeded the profits of his shares down to the time when the old setts expired.

Mr. *Jacob*, Mr. *G. Richards* and Mr. *Follett*, for the Plaintiff:

In February and March 1820, Mr. *Grylls* wrote to Mr. *Henry Woolcombe*, who was the solicitor to Mr. *Leach* and Mr. *Woolcombe*, the trustees of the Defendant's property, and represented that it would be ad-

vantageous to the Defendant, for the trustees to take shares in the mines, on his account. Mr. *H. Woolcombe* was, at first, disinclined to involve his clients in any risk; but, after some further correspondence with Mr. *Grylls*, he, on behalf of the trustees, instructed a person, named *Davey*, to examine the mines and to report to him as to the expediency of taking shares in them. *Davey*'s son answered the letter; and, in consequence of the advice contained in it, Mr. *H. Woolcombe* instructed *Grylls* to take four shares for the Defendant. Whilst this was going on, a meeting of the intended shareholders took place on the 22d of March 1820, and *Grylls*, who had previously taken only three shares, agreed to take 11 shares in the mines; and signed the resolutions entered into at that meeting, as a purchaser of those shares for himself and friends. Then, in pursuance of the plan, which had been previously formed, for making a title to the mines through the medium of a sale in the vice-warden's court, an amicable suit was instituted, in that court, by a creditor of the *Gundrys*, the bankrupts; and *Grylls* having previously relinquished the shares of the bankrupts in the mines (without however having apprised the creditors of his intention so to do), the mines were sold under the vice-warden's decree. *Grylls* was the only person who bid at the sale, and he, in pursuance of a previous arrangement with some of his co-adventurers, purchased the mines for 18,000*l.* *Grylls* advanced the money for the purchase of the Defendant's four shares, and was afterwards repaid it. Those shares, for some time, stood in *Grylls*' name; but, after a short time, they were transferred into the Defendant's name; and the Defendant has, from time to time, received his share of the profits. At the time when those transactions took place, *Grylls* was standing in the situation of assignee of the *Gundrys*, who had been the proprietors of nearly one

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half of the shares in the mines; and everything that was done with respect to the Defendant, was done through the agency of *Grylls*. He took the shares and managed the whole business for the Defendant; so that, whatever interest the Defendant acquired in the mines, was acquired by a dealing carried on by the agency of the individual who was the assignee of the bankrupts' estates; and, therefore, the Defendant cannot be allowed to retain any benefit acquired thereby. In 1825, the creditors of the bankrupts began to complain; and a petition, *Ex parte Badcock* (*a*), was presented, in the bankruptcy, to the *Lord Chancellor:* and his Lordship ordered *Grylls* to relinquish, for the benefit of the bankrupts' estate, the shares in the mines which he continued to hold, and that he and *Read,* who was his co-assignee, should be removed and new assignees appointed. The case of *Ex parte Bennett* (*b*), to which the *Lord Chancellor* refers in his judgment, is one which applies, very closely, to the present case. There a purchase of a bankrupt's property, was set aside, because one of the commissioners had bid for it and purchased it on behalf of a third person; although he merely repeated the words that had been put into his mouth by the agent for the purchaser, who had been suddenly called out of the auction-room. That case applies, directly, to the present. Neither the Defendant nor his trustees had anything to do with this matter, except through the agency and trusteeship of Mr. *Grylls.*

It is immaterial whether the transaction was a purchase of the shares of the bankrupts; or whether it was a purchase and an acquisition of property in which the bankrupts were interested; if it was obtained by means of the bankrupts' property, by means of a surrender of

(*a*) Mont. & Macar. 231. (*b*) 10 Ves. 381.

it through the agency of the assignee, and by his power and authority. For the same principle applies whether it is a simple purchase, or whether it is any other transaction by which profit is acquired by the assignee or his friends for whom he is acting. It is not necessary to show that the property which the assignee has got is, specifically, a part of the bankrupt's property. For example, if an assignee has, in his character of assignee, a leasehold estate, or is in possession of property as tenant from year to year, and makes an arrangement, with the landlord, by which he obtains a new lease on surrendering the interest which he has as assignee; then, what he has got for himself, is something different from what the bankrupt had; but still he has got it through his position as assignee, and by the surrender of that which was before in the bankrupt: and, in such a case, he will be declared a trustee of the whole of that which he has thus acquired, and not merely of the few years of the bankrupt's term which remained unexpired. One of the late cases in which this or a similar principle was acted upon, was certainly a very strong case: *Greenlaw* v. *King* (*c*). There the incumbent of a parish had power to raise money by annuity, with the consent of the bishop of the diocese, for the purpose of rebuilding the parsonage-house. He tried to borrow the money, but nobody would lend it to him except at nine per cent. The bishop, however, advanced him the money at a lower rate. The bishop and the incumbent both died; and the new incumbent filed a bill, against the bishop's executors, to set aside the transaction; and it was set aside. So, in *Cook* v. *Collingridge* (*d*), and *Wedderburn* v. *Wedderburn* (*e*), transactions by means

(*c*) Reported, on other points, in 1 Beav. 137.

(*d*) Jac. 607.

(*e*) 2 Keen, 722; and 4 Myl. & Cr. 41.

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of which executors had acquired a benefit from the property of their testators, were set aside, and the executors were decreed to account for the profits which they had derived from the transactions.

The judgments of the *Lord Chancellor*, in *Ex parte Badcock* and *Ex parte Grylls* (*f*), involve the whole of the principle which we are contending for: because *Grylls* was declared a trustee of those shares which he took for his friends, and which they declined to adopt, and also of those which they returned to him, inasmuch as they, taking the shares through his agency and trusteeship, could not have retained them.

Among the different points relied on, by the Defendant, in his answer, one is the length of time during which he has been allowed to enjoy the profits of his shares. The Court will have noticed that, during a period of nine years from the bankruptcy, the bankrupts' affairs were under the management of the gentleman who was principally concerned in the transactions to which this suit relates. The petition for the removal of *Grylls* and *Read* from the assigneeship, was presented in 1825. They opposed that petition most vigorously, so that it was not until some time in the year 1829, that the *Lord Chancellor*'s order for their removal, and for the choosing of new assignees, was made: and the choice of new assignees was then delayed in consequence of a renewed commission being to be taken out. Afterwards, the new assignees were involved in the proceedings on Mr. *Grylls*'s petition, which did not terminate until 1832 or 1833: and, in 1835, the present bill was filed; which is much within the time

(*f*) 2 Deac. & Chitty, 290.

allowed for suing in Equity. The Defendant, too, in consequence of the litigation in the bankruptcy which had been going on for so many years, must long since have had notice that the transaction respecting the purchase of his shares, was one which was subject to be impeached.

Lastly: if Mr. *Trelawny* is to account at all for the profits of his shares, the account must be taken not merely from six years before the filing of the bill, but from the time when his shares were purchased. For this is a case to which the rule founded on the Statute of Limitations does not apply. It is a case which a Court of Equity considers as a breach of trust, and, therefore, the account must commence in 1820. *Wilson* v. *Moore* (*g*).

Sir *William Follett*, Mr. *Knight Bruce*, Mr. *Sharpe*, and Mr. *Steere*, for the Defendant:

The ground on which the Plaintiff rests his claim to the relief sought, is that Mr. *Grylls*, one of the persons who acted in forming the new company of shareholders, was the assignee of the *Gundrys*, who had held a considerable portion of the shares: but it is impossible to contend, with success, that the doctrines of a Court of Equity can allow a Plaintiff to unrip, after so great a lapse of time, a transaction which is proved to have been perfectly fair and honest, and, to have proceeded from the best of motives. It is in evidence in the cause, that *Grylls* accepted the office of assignee unwillingly, and in compliance only with the urgent solicitations of the creditors. There is no imputation against him or any other party to the transaction: they acted *bonâ fide*

(*g*) 1 Myl. & Keen, 126 and 337.

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and from the purest motives. If they had not taken upon themselves the management of the mines, the working of them must have ceased; which would not only have occasioned a great sacrifice of property, but would have thrown many persons out of employment, and have caused great injury to the neighbouring town of *Helston*. The relinquishment of the bankrupts' shares in the mines by the assignees, was a right and proper act: it was done with the advice of counsel; and was the necessary consequence of the bankruptcy of the *Gundrys*, and of the circumstances under which the mines were placed at that time: for they were then a losing concern, and the *Gundrys* were greatly indebted to them. Other shareholders also relinquished their shares. By the relinquishment, the interest which the bankrupts had in the mines, was put an end to. The evidence shows that that measure was not adopted with a view, as has been stated, to carry into effect the plan of forming the new company. None of the Plaintiff's witnesses state that it was adopted for that purpose, or that the shares of the bankrupts could have been sold, or, indeed that any other course than that of relinquishment, could have been taken with respect to them. There is no evidence, as there was in *Ex parte Bennett*, that the shares were sold for less than their value: on the contrary, it is proved that they were absolutely unsaleable; and the assignees relinquished them, in order to avoid any further loss. It is proved also that, for 18 months after the formation of the new company, the mines continued to be a losing speculation, and that, in those 18 months, a loss of above 5,000 *l.* had been incurred. We find too that a gentleman who held four shares relinquished them at that time, although he was not indebted to the mines. It is evident, therefore, that the relinquishment by the assignees, was

not a colourable act; but was one which it was their duty to do. Besides, the bankrupts owed a very large debt to the mines, to which their shares were subject; it was quite impossible therefore that their shares could have been turned to any advantage for their estate. Lord *Lyndhurst*, when the case was brought before him in *Ex parte Badcock*, said that, whether the creditors were or were not consulted as to the expediency of relinquishing the shares, was a matter of controversy; but that it was clear that the relinquishment was known to the creditors, and that they did not object to it. Now, it appears, from the evidence in this cause, that the assignees did consult the creditors present at a meeting held on the 20th of April 1820, and desire their opinion upon the steps to be taken with respect to the bankrupts' shares: and that the creditors decided that the shares should be relinquished. It is evident, therefore, that the shares were then considered to be worth nothing to the bankrupts' estate. Lord *Lyndhurst* further says that, considering that the mines could not be made immediately available or beneficial to the estate, the assignees were not bound, in point of law and of strict propriety, to incur personal responsibility by continuing the works, and that, looking at this transaction, singly, they were justified in what they did. If then the relinquishment was a right and proper act, one which it was the duty of the assignees to do, and which was done by them with the consent of the creditors, on what ground can the Plaintiff be entitled to the relief which he asks; for, by the relinquishment, the interest of the bankrupts was entirely gone. Since that act was done, there has been a great lapse of time; nothing, however, has occurred or could have occurred to render the transaction invalid. It is true that the mines have become profitable in the

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hands of the new company; but from what causes? In December 1821, the company surrendered the old setts and obtained new ones, having prevailed on the lord of the soil, that is the Defendant himself, to reduce his tolls one-half, and to grant to them additional ground. They have sunk new shafts, made new levels, erected new engines and worked the mines in a more scientific manner than the *Gundrys* did; and they have expended nearly 8,000*l.* in so doing. Under these circumstances, will this Court set aside a transaction which took place 15 years before the bill was filed, and make the Defendant account for the profits which he has received?

We now come to a very important question in this case, and that is, supposing, for a moment, that this Court should consider the relinquishment as part of the transaction, or that there were circumstances relating to the relinquishment which rendered it possible to set aside the transaction as against the assignees or any person immediately connected with the bankrupts, can that be done as against a person standing in the situation of Mr. *Trelawny*? The mines were beginning to fail, and there was good ground for apprehending that they would cease to be worked. His trustees, at first, declined to take any shares in the mines; but, after the report which they received from *Davey*, whom they had sent to examine the mines, they consented to take four shares, for the Defendant. The Defendant became an adventurer in the mines, precisely in the same way as any of the other adventurers, that is, he took a certain number of shares and paid a certain sum for them. That sum passed through *Grylls*'s hands, as did the money which the other adventurers paid: because *Grylls* had become the purchaser of the whole of the mines, under the decree in the vice-warden's court, in pursuance of

the arrangement made by the adventurers; and, consequently, the different adventurers paid him for their shares, and he paid what he received into a bank, and the money was afterwards paid out to the different creditors of the mines.—[The *Vice-Chancellor*: Therefore you refer the purchase made on the Defendant's account, to the fact that *Grylls*, under the decree, had become the purchaser of the whole.]—That is, we submit, the correct view of the matter. It does not precisely appear at what time the Defendant's trustees consented to take shares for the Defendant. *Grylls*, it is true, took a certain number of shares for himself and his friends; but it does not appear that he took any of them, specifically and purposely, for the Defendant. Now, is this case within the principle of *Ex parte Bennett*? Is there not one important point which the Plaintiff has omitted to establish, namely, that the Defendant, or his trustees, or their solicitor, had notice of the bankruptcy, and that *Grylls* was the assignee? The Defendant, in his answer, says that he had not, nor, as he believes, had his trustees or their solicitor, at or before the time when he took to the shares, or at or before the time when the purchase-money was paid for the same, any notice or information whatever of the circumstances in the bill alleged to have attended the sale of the mines, or of any circumstances whatever whereby such sale, or the title of purchasers under the same, could be impeached: and, in the correspondence between *Grylls* and the trustees, there was nothing whatever which had reference to the bankruptcy, or to the position in which *Grylls* stood with regard to the bankrupts. But it does not rest here, for Mr. *Henry Woolcombe* has distinctly sworn that he did not know that *Grylls* was assignee of the bankrupts' estate. Moreover, the Defendant has re-

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duced, by one half, the tolls which he was entitled to under the setts of the mines which were in existence at and for some time after the bankruptcy. He has granted new setts, including additional ground; and he and his co-adventurers have expended large sums in rendering the mines profitable.

The parties interested in the bankrupt's estate were cognizant, in 1825, of all the facts on which this bill is founded: why then was the institution of this suit delayed until 1835? In 1825 they proceeded against Mr. *Grylls*; why did they not then proceed against the Defendant? Instead of doing so, they have laid by until the mines have been made profitable by means of a large expenditure of capital, and in consequence of the new setts that have been granted, including new mines, and on terms much less advantageous to Mr. *Trelawny* than the old ones. The case of *Norway* v. *Rowe* (*h*) is an authority that the circumstance of the Plaintiff having laid by, until the expenditure has taken place, is alone sufficient to prevent this Court from giving the relief that is asked by this bill. *Muskett* v. *Hill* (*i*) was another case relating to mines; and there the Court refused to interfere on the same principle as was laid down in *Norway* v. *Rowe*.

The VICE-CHANCELLOR:

This case has occupied a long time, but, in my opinion, it is one of the simplest cases that ever was brought before the Court of Chancery, at least within my knowledge. A great deal of evidence has been read, but it seems to lie in a small compass.

(*h*) 19 Ves. 144; *see* 159.

(*i*) An unreported case, before the *Lord Chancellor*, in 1840.

As I understand the case, Mr. *Grylls*, first of all for a laudable purpose, took active measures respecting the mines. I give full credit to the motive by which he is said to have been actuated, namely, a regard to the welfare of the neighbourhood, and of the labourers employed in the mines. But, a very little while after he had first taken an active interest in the prosperity of the mines, the *Gundrys* became bankrupt and he became their assignee; and then it was thought right, in the prosecution of the general purpose of supporting the mines, that various means should be adopted: and it appears that relinquishments were made of the shares of the *Gundrys* in the mines. If the matter had stopped there, there would have been nothing to complain of. But the matter did not stop there; and it is quite plain that it was not intended to stop there; for the parties, after making the relinquishments, went on to construct a new company, into the mass of which the shares which the *Gundrys* formerly had in the mines, were to be thrown. Then, in April 1820, *Grylls* became the owner of 11 out of the 54 shares into which the mines were divided; and those 11 shares were taken by him for himself and his friends; by which, of course, I understand that if, in the first place, any friends would share with him, he was willing they should do so on terms about which there was no dispute; and, if not, he was to take the whole himself: and that appears to have been the way in which the matter was treated. Now it seems that there was, before the end of the month of March, a chaffering between Mr. *Grylls* and Mr. *Henry Woolcombe* as to certain of the shares, which, it was proposed, should be taken for the benefit of Mr. *Trelawny*: but nothing very definite was done at the time; but the matter was, in effect, to be a subject for further consideration: and inquiry was to be made,

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on the part of Mr. *H. Woolcombe* for the benefit of Mr. *Trelawny*, whether it would really answer to take any shares. The proposal which was made by the letter of the 8th of March, was in these terms, "I know it is decidedly for his (the Defendant's) interest to do so;" that is, to take shares in the mines; "and if he will undertake to carry on three shares on his attaining 21, I will get the money advanced." Then, on the 11th of March, Mr. *H. Woolcombe* wrote to Mr. *Grylls* and said: "I write by this night's post to Captain *Wm. Davey*, requesting him to visit *Wheal Vor** once more, and, if he recommends us to purchase the three shares you recommend, we will do so, provided you can advance the money at present, and not require payment till the 1st of September next." Then it seems there was an inquiry made by Captain *Davey*, the party named by Mr. *H. Woolcombe*; and Mr. *H. Woolcombe* himself, as I understand, went to visit the mines; and the result of it altogether was, that it was arranged, between Mr. *H. Woolcombe* and Mr. *Grylls*, that *Woolcombe* should take, for Mr. *Trelawny*, four of the shares, which were four of the eleven 54th shares which, ultimately by the resolution of 22d March 1820, were marked down, to *Grylls*, for himself and friends. The rest is mere machinery. An application was made, to the vice-warden's court; the result of which was that the mines and the halvans, including the various materials, engines, and so on, were sold for 18,000*l.*

The real nature of the transaction was that the 18,000*l.* was to be contributed, by the persons who were to become partners in the new adventure, at the

* The name of the mines.

rate of 333 *l.* 6 *s.* 8 *d.* for every 54th. That is plain, because the 18,000 *l.* was to be divided by fifty-four; and I only notice that, for this reason, namely because it appears, by the subsequent letter which was written towards the close of the year, that there actually were paid, on the Defendant's behalf, partly by a gentleman named *Sylvester* and partly by *Henry Woolcombe*, sums which together made 1,333 *l.* 6 *s.* 8 *d*; which was the proportionate value of four of the eleven 54th shares, at the rate of 333 *l.* 6 *s.* 8 *d.* for every 54th.

What struck me as remarkable is this: that it is quite plain that the transaction was not a purchase from Mr. *Grylls*; but that it was a transaction by means of which when Mr. *Trelawny* or his agents did actually pay the 1,333 *l.* 6 *s.* 8 *d.*, they merely paid the proportionate part of the 18,000 *l.* for which that sale, whatever its character was, did take place in the month of June before. So that it is not a case in which you can consider Mr. *Grylls* as, first of all, in any way becoming the owner of certain shares, and then selling them, by a distinct transaction and by means of a distinct contract: but it is impossible to look at all the circumstances taken together, without seeing that the ultimate payment which was made in the month of November 1820 on the part of Mr. *Trelawny*, was nothing more than, as he represents it in his answer, the adoption of the original transaction by Mr. *Grylls**. I dwell on that

* The answer did not state, in express terms, that the Defendant adopted *Grylls*'s contract, as far as his four shares were concerned: it admitted however, towards the end of it, that the Defendant did, in the manner and under the circumstances thereinbefore stated, become the purchaser of four of the eleven 54th shares, *by the means of Grylls.*

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more, because, if that be the true view of the case (as it strikes me to be), there is an end of all question about notice.

I must say that, when Mr. *Knight Bruce* made the representation which he did about the notice, it struck me that he then said the only thing that really was of weight, in the case, for the Defendant. But if the circumstances, when looked at, resolve themselves into this, that, originally, there was a severance, from the mass of the new interest taken by the new adventurers, of four 54ths, subject to this sort of loose arrangement, namely, that if, when Mr. *Trelawny* came of age, he or his trustees would pay the due proportion of the sum which was treated as the purchase-money for the whole 11 shares, he should have four of them: then, from the very beginning, Mr. *Grylls* was himself an agent: and, therefore, whatever knowledge he had of the transaction, must, of necessity, affect those for whom he was acting as agent.

It appears to me that that is the true view of the case; and, if it is, it will follow, as a matter of course that, from the commencement, Mr. *Trelawny* must be considered as holding, with notice, a certain portion of the bankrupts' interest in the mines which was not acquired in a legitimate manner: and the consequence, therefore, is that he must be considered as a trustee of the property, and must account for all the profits he has received; but of course all just allowances must be made to him.

Mr. *Knight Bruce*:—Does your *Honor*, in using the expression "the bankrupts' interest," extend that ex-

pression to the whole of the four 54ths under the new arrangement, or only to so much of them as would be taken out of the bankrupt's estate?

The *Vice-Chancellor*:—I think it must be considered that *Grylls* reserved to himself, or took to himself some portion of that interest which the bankrupts had before, and for this reason: because the interest which the bankrupts had in the mines, amounted to more than a third of the shares; and it is quite obvious that eleven shares are not one-third of fifty-four: consequently, the interest which *Grylls* had, can only be accounted for as being a portion of the mass of the interest which the bankrupts had.

Mr. *K. Bruce*:—Under the head of just allowances, the *Master* can allow only the amount of dues paid: does your *Honor* decide that the allowances are to be made, to Mr. *Trelawny*, without regard to the diminution of dues?

The *Vice-Chancellor*:—It seems to me that I have no more to do with that, than I have to do with the fluctuating price of any article which the gentlemen who were carrying on the mines, might have occasion to buy from time to time. My notion is that, originally, the eleven fifty-fourths were the property of the bankrupts; and then, for the purpose of carrying on the mines, the lord made new setts, which were accretions to the bankrupts' shares; and, in my opinion, the estate of the bankrupts is as much entitled to the benefit of those new setts, as they are to the benefit of any new machinery which the adventurers may have thought fit to use in working the mines.

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Declare that the Defendant is a trustee of four of the eleven shares of the mines called the *Wheal Vor* consolidated mines* in the pleadings mentioned, for the Plaintiff; and that the Plaintiff is entitled to the profits of such four shares from the month of June 1820: Order the Defendant to transfer such four shares to the Plaintiff: Refer it to the *Master* to take an account of the profits of the four shares from the month of June 1820; and, in taking such account, *the Master is to allow, to the Defendant, the sum of* 1,333 *l.* 6 *s.* 8 *d. paid by him to H. M. Grylls in the pleadings mentioned*: and, for the better taking the said accounts, the parties are to produce, before the *Master*, upon oath, all books &c., and are to be examined on interrogatories as the *Master* shall direct, who, in taking the accounts, is to make, unto the parties, all just allowances: Order the costs of the suit up to and including the hearing, to be taxed *and paid by the Defendant.*

* This was the name given to the mines after the new setts had been made.

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1841: 12th March.

Case sent to law. Order.

Form of order where a case has been sent to a court of law on the argument of a demurrer, and, on the return of the certificate, the case is sent to another court of law.

THE question in this case arose upon the construction of a will, and was brought before the Court by demurrer. The Court did not decide the question, but directed a case to be made for the opinion of the Barons of the Exchequer. On the return of the certificate of the learned Barons, the question was again discussed, and the Court directed a case to be stated for the opinion of the Judges of the Queen's Bench (*a*). The following is the form of the order which Mr. *Colville*, the Registrar, drew up on the occasion:

"The matter of the demurrer filed to the Plaintiff's bill coming on to be argued, in this Court, on the 12th of February 1839, in the presence of counsel &c., on debate of the matter &c., this Court did order that a case should be made for the opinion of the Judges of Her Majesty's Court of Exchequer, and that the question should be: "What estate &c.": and it was ordered that it should be referred, to the *Master* of this Court in rotation, to settle such case if the parties differed about the same: and it was ordered that the Judges of the said Court should be attended with such case: and it was ordered that the demurrer should stand over until after the Judges of the said Court should have given their certificate; and the parties were to be at liberty to apply &c.: that, in pursuance of the said order, a case was made for the opinion of the said Judges of the said Court of Exchequer, who were attended thereon, and,

(*a*) See *ante*, Vol. X. p. 224.

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by their certificate dated the 30th of January last, they certified as follows (that is to say): "We have heard &c.": and the matter of the said demurrer coming on this present day to be again argued before this Court, on the said Judges' certificate, in the presence of counsel &c., upon debate of the matter and hearing the said order and the said certificate read, and what was alleged by the counsel on both sides, this Court doth order that a case be made for the opinion of the Judges of Her Majesty's Court of Queen's Bench, and that the question be: "What estate &c.": and it is ordered that it be referred, to the *Master* to whom the former case was referred, to settle such further case, in case the parties differ about the same: and it is ordered that the said Judges of the said Court of Queen's Bench be attended with such case: and it is ordered that the said demurrer do stand over until the Judges of the said Court shall have made their certificate: and any of the parties are to be at liberty to apply &c."

THE ATTORNEY-GENERAL, AT THE RELATION OF HENRY JACKSON AND THOMAS STRINGER - - - - - Informant;

and

THE MASTER, WARDENS, AND COMMONALTY OF THE MYSTERY OF CORDWAINERS, LONDON - - - - Plaintiffs:

v.

JOHN SOUTHGATE AND OTHERS, Defendants.

1841: 12th March.

Will. Construction. Administration. Debts. Legacies.

Testator gave all his real, leasehold and personal property to trustees, upon the trusts after mentioned; and, to effect those trusts, he directed them to sell all his property, in order to form a fund to pay his debts and legacies, and then to dispose of the residue as after directed. The testator next gave several legacies, and then gave the residue of his property remaining in the hands of his trustees, to trustees for a charity. The *Vice-Chancellor* held that the leasehold and other personal property were alone liable to the payment of the debts and legacies. But The *Lord Chancellor*, on appeal, differed from His *Honor*, and held that the debts and legacies were payable out of the mixed fund, composed of the produce of the real as well as the leasehold and other personal estates, in proportion to the relative values of those three estates.

JAMES MILNER made his will, dated the 19th of March 1830, part whereof was in the following words:

"I give, devise, and bequeath to Mr. *John Banks*, Mr. *John Southgate* junior, and Mr. *William Rowe*, my executors hereinafter particularly appointed, all my freehold and leasehold property whatsoever and wheresoever, and all my personal property of whatsoever sort or kind the same or any part thereof, may be, to hold the same to them the said *John Banks, John Southgate* junior, and *William Rowe*, their executors, administrators and assigns, upon trust to and for the ends, intents and purposes of this my will as hereinafter directed; and, to effect the said trusts hereinafter willed and directed, my said trustees, or the survivor of them or

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the executors and administrators of such survivor, do and shall, as soon after my decease as may be, make sale and dispose of all my said property either by public sale or private contract as may seem most meet and best, and call in and receive all such debts, and execute all such deeds and conveyances or other assurances in the law, and give such receipts as may, in all and every case, be necessary for the perfecting such sale or sales, and, on receipt of all the monies to arise and be produced by the sale of my whole property, shall deposit the same, in their joint names, in the Bank of *England*, to form a fund out of which to pay, in the first place, my just debts and expenses and all expenses attendant on this my will, and then to pay over, invest, and distribute the residue thereof as hereinafter more particularly described and directed: and, first, relative to my niece *Julia Smith*, formerly *Julia Travis*." The testator then recited the trusts of a settlement of a sum of 5,000*l.*, which he had executed on the marriage of his niece, and that a clause had been introduced into it directly contrary to his will, wishes and directions, whereby the 5,000 *l.*, in case of his niece's death in the lifetime of her husband, was to become the absolute property of her husband, and declared that, if his niece or her husband or the trustees of their settlement, should, after his decease, make a demand upon his executors and trustees by virtue of the settlement, and should compel payment of the 5,000*l.*, they and all and every person and persons claiming by or from them or on their behalf, should be for ever debarred from any benefit, claim, or demand by, from, or out of any part of his real or personal estate, in any manner howsoever, but, in case his niece and her husband and the trustees of their settlement should, during his lifetime or after his decease, immediately upon the publication of his will, cancel and

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destroy the settlement, then he gave, devised, and bequeathed 5,000 *l.* to the trustees of the settlement, to be issuing and payable out of his estate and effects and the monies to be produced by the sale thereof by his executors as before mentioned, to hold to the trustees of the settlement, in trust for the separate use of his niece for life, and, in case she should die in the lifetime of her husband leaving a child or children by him, then in trust for such child or children; but, in case she should die in her husband's lifetime without leaving any child or children as aforesaid, then he willed and directed that his said trustees should hold the said monies, and pay the interest and dividends thereof to his niece's husband during the husband's life, and that, at his decease, the 5,000 *l.* should revert to and become part and parcel of his, the testator's, real and personal estate and effects, and should be transferred and transferable as he had thereinafter directed and appointed concerning the residue of his property. The testator then gave pecuniary legacies to several of his relations, friends and servants, and directed that none of those legacies should be payable until his executors and trustees should have sufficient money in hand to pay the whole; and he further directed that his trustees and executors should not be liable to pay or make good any more sum or sums of money than might be actually produced by sale of his property, nor be answerable for any more interest or dividends than should respectively actually come to their hands, nor be liable to make good any losses that might happen to the aforesaid trust monies, estate or effects, or the said residue, or in placing out the said trust-monies according to the directions of his will: and he further directed that his executors should pay and

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reimburse themselves, out of his estate and effects, all reasonable costs, charges and expenses for loss of time and trouble in executing his will, and all expenses attendant on the trusts thereof. He then expressed himself as follows: "And whereas I hope and trust Providence, in His goodness towards me, has blessed me with more than will be necessary to pay the sums hereinbefore bequeathed and given, therefore, from and after every demand on my estate be satisfied, I give, devise and bequeath the residue of my property then remaining in the hands of my said trustees in the Bank of *England* as aforesaid, unto the Master, Wardens and Court of Assistants of the Cordwainers' Company in *Distaff-lane* in *London* for the time being, to hold to them the said Master, Wardens and Court of Assistants and their successors for ever, in trust that they, on the receipt of the said residue, invest the same in permanent Government securities, in trust to receive the dividends or interest to become due thereon from time to time, and, after allowing themselves a reasonable remuneration for their trouble, shall, half yearly, distribute and divide the same amongst so many poor and distressed fathers of families, that each father may not receive more than 20 *l.* a year, nor less than 15 *l.* a year during his life." The testator made two codicils, both of them dated the 25th of March 1830, and thereby gave some further pecuniary legacies and directed that they should be paid by the executors to his will at such time and in such manner as therein directed, but did not alter his will in any other respect.

The testator died on the 28th of March 1830.

The bill was filed to establish the will and carry the trusts of it into execution.

As the testator died seised of real estate and possessed of leasehold and other personal property, the devise and bequest to the Cordwainers' Company, was good as to his pure personal estate, but void, under the statute of mortmain, as to all the rest of his property.

At the hearing of the cause for further directions,

Mr. *Knight Bruce*, Mr. *Wakefield*, and Mr. *K. Parker*, for the Company, and

Mr. *Anderdon* and Mr. *Piggott*, for some of the testator's next of kin, who had been made Defendants, by supplemental bill, as being entitled to the leasehold property, or the produce of it, exempt from the bequest to the Company, said that the testator had expressed an intention that his entire property should form one mass, without any distinction as to the liability of the separate parts of it: that the Court, finding such an intention, must give effect to it, and direct the testator's debts and legacies to be paid out of the different descriptions of property in proportion to their relative values or amounts; as was done in *Roberts* v. *Walker* (*a*). They referred also to *Williams* v. *Kershaw* (*b*) and *Johnson* v. *Woods* (*c*) and *Fourdrin* v. *Gowdey* (*d*).

Mr. *Jacob* and Mr. *F. J. Hall*, appeared for the testator's heir, and

Mr. *Wigram*, Mr. *Stinton* and Mr. *Hallett* for the other parties.

The VICE-CHANCELLOR, without hearing them, said:

The only question is whether the testator in this

(*a*) 1 Russ. & Myl. 752.
(*b*) 1 Keen, 274, note.
(*c*) 2 Beav. 409.
(*d*) 3 Myl. & Keen, 383.

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case, has expressed an intention that the general rule of this Court as to the payment of debts and legacies, should be altered. I confess that I cannot see anything in this will to prevent the application of the rule in the usual way.

In *Roberts* v. *Walker*, Sir *John Leach*, M.R. says: "When a testator creates, from real estate and personal estate, a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estates which have been converted into that fund, shall answer the stated purposes and every of them, *pro rata*, according to their respective values." That, in my opinion, is quite a gratuitous proposition; and I consider that Sir *John Leach*'s decision in *Roberts* v. *Walker* is contrary to the ordinary rule of this Court as observed in the administration of assets.

Declare that the costs, charges and expenses already taxed and paid, and those directed to be taxed and paid as aftermentioned, are charged upon the testator's real estate and his personal estate savouring of realty and his pure personal estate, and are payable thereout in proportion to the relative values of those estates: declare that the testator's debts, funeral expenses and legacies ought to be paid out of the testator's personal estate savouring of realty and out of his pure personal estate, in proportion to the relative values of those estates: declare that the testator's heir at law is entitled to the produce of the sale of the testator's real estates, subject to the charges before declared and to the expenses of the sale thereof: declare that the residuary bequest is void to the extent of that proportion of the residuary estate which consisted of personal estate

savouring of realty: declare that the testator's next of kin living at his death are entitled to such last-mentioned personal estate; and declare that the Plaintiffs, as trustees of the charity, are entitled to the pure personal estate, subject to the several charges thereon.

The Plaintiffs appealed to the *Lord Chancellor* from the above decree. The *Lord Chancellor* differed in opinion from the *Vice-Chancellor*, and decided that the testator's debts, legacies &c. ought to be paid out of the mixed fund.

His Lordship's decree, dated the 23d of December 1842, declared that the testator's debts, legacies and funeral expenses, together with the costs, charges and expenses already taxed and paid and thereby directed to be taxed and paid, were a charge upon the testator's real estate and his personal estate savouring of realty and his pure personal estate, and were payable thereout in proportion to the relative values of such estates respectively: that the testator's heir was entitled to the produce of the sale of the real estates subject to the funeral expenses, debts, legacies and other charges before declared and also to the expense of the sale of the real estates: that the residuary bequest was void to the extent of that portion of the residuary estate which consisted of personal estate savouring of realty, and that the testator's next of kin living at his death, were entitled to the personal estate savouring of realty subject to the funeral expenses, debts and legacies and the other charges affecting the same, as before declared.

1841:
5th, 6th, 20th, and 23d March.

Charity. Mortmain. Stat. 9 *Geo.* 2, *c.* 36. *Lease.*

A school was founded for the education of poor children within a certain district. The district was converted into a dock, under a local Act of Parliament, so that the objects of the charity failed. The Court referred it to the *Master* to approve of a scheme for the application of the funds of the charity, *cy pres.*

A lease of land already in mortmain, made to a charity, does not require enrolment under 9 Geo. 4, c. 36.

THE ATTORNEY-GENERAL *v.* GLYN.

IN 1705, the Master, Brethren and Sisters of *St. Katharine*'s hospital, near the Tower of *London*, established a school for the education of poor children, inhabiting the precinct of *St. Katharine*, which was their property: and, in April 1812, they granted a lease of two houses in the precinct, to trustees, for the benefit of the school. The lease was granted for 40 years *, and at a rent of 2*l.* 14*s.* per annum. The *St. Katharine*'s Dock Company, under their Act of Parliament, purchased the precinct, including the site of the hospital, and converted it into a dock: the consequence of which was that there were no children to attend the school. The hospital, however, was rebuilt on a new site, provided for the purpose in the Regent's Park.

The questions in the cause were: First; whether the lease was not void under the statute of mortmain, 9 Geo. 2, c. 36, for want of enrolment.

Second; whether it was not void under the statutes 13 Eliz. c. 10, s. 3, 14 Eliz. c. 11, s. 19, and c. 14, relating to leases granted by ecclesiastical corporations, masters of hospitals, &c.

* Under 14 Eliz. c. 11, s. 17 & 19, leases for 40 years of houses belonging to any ecclesiastical persons or bodies politic or corporate, situate in any city, borough, town corporate or market town, or *the suburbs thereof*, are good. See *Vivian* v. *Blomberg*, 3 Bing. N. C. 311; and *ante*, Vol. VII. p. 548.

Third; whether a reference ought not to be directed, to one of the *Masters* of the Court, to approve of a scheme for applying the sum for which the lease of the houses had been sold, to charitable purposes *cy pres*.

Mr. *Romilly* and Mr. *Goodeve*, for the relators, said, first, that the houses were in mortmain at and long before the time when the lease of them was granted; and, therefore, the lease was not within the statute of mortmain. *Walker* v. *Richardson* (*a*); *De Costa* v. *De Paz* (*b*).

Secondly: that the 14 Eliz. c. 11, was the statute under which the lease had been granted, and that the terms of the lease were in conformity to the 19th section of that statute.

Thirdly: that, where a trust for a charity had once attached, this Court would not allow it to fail for want of objects, but would provide for the application of the funds *cy pres*.

Mr. *Knight Bruce* and Mr. *Craig*, for the Dock Company, contended:

First: that the lease having been granted for the benefit of a charity, it was void for want of enrolment.

Secondly: that the yearly accustomed rent was not reserved by the lease, as required by the statutes of Eliz., or, at all events, there was nothing to show that the rent reserved was the accustomed yearly rent.

Thirdly: that the lease having been granted not for general but for a particular charity, which had failed,

(*a*) 2 Mees. & Wels. 882.
(*b*) Amb. 228; and 2 Swans. 487, note.

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ATTORNEY-GENERAL v. GLYN.

the Court would not apply the funds to any other charity. *Cherry* v. *Mott* (c).

The VICE-CHANCELLOR:

Here there was a charity established (which has existed more than a century), for the benefit of the poor children of the precinct. Now, the mere accidental fact that the Legislature has interfered and has destroyed, in effect, that precinct, does not appear to me to have destroyed the original charity. I apprehend that the Court finding an existing charity, will see whether there cannot be an application of the funds. Because, all that has been done is this: the old site of the hospital has been taken away and a new site has been given. What the particular provisions of the Act of Parliament are respecting the site of the new hospital, I do not know; but the hospital is not destroyed: it continues, and it appears to me that, as a part of the appendage to the hospital, that very charity itself does continue. It repeatedly happens that, where a charity has been instituted and has gone on for a century or more, and, for some reason or other, the charity cannot go on as it did, this Court will direct the *Master* to approve of a scheme; and, this being a case in which I must consider that the charity is existing and has not reverted, I must adopt the same course; more especially as, for anything that has been shown to me to the contrary, there may be persons, who are fit objects of the charity, within the precincts of the site of the new hospital.

Next, with respect to the lease. Supposing it is good, what is it, in effect, but a donation by the hospital to the

(c) 1 Myl. & Cr. 123.

charity? And supposing the lease is good, it is just the same as if money had been given. I see no difference; but whether it is good or not in law, is another matter.

All that the information and bill states respecting the lease, is that demises were made, from time to time, by the chapter of the hospital on the payment of fines, at the pleasure of the chapter for the time being. The answer makes no objection at all to the lease; but an objection is made, at the bar, in respect of the language used in the information and bill. Now the information and bill might have expressly averred that the lease was made at the accustomed yearly rent or more; but it has not. Therefore, before I make any decree which will give, to the informants and plaintiffs, the benefit of the lease, I must have it clearly made out that the lease is good under the statutes of Elizabeth, a matter which, at present, is left in uncertainty; and, for that purpose, it will be necessary to direct an inquiry before the *Master*, which will have the effect of eliciting the fact whether the lease is a good lease within those statutes.

I have always understood that it is quite a settled point, that a lease that is made by an eleemosynary corporation, though not ecclesiastical, is within the operation of the statutes; and, therefore, the only question will be whether this is a lease which, by reason of its being a lease of tenements, within the suburbs of the city, for a period not exceeding 40 years, is a good lease or not in respect of the rent reserved.

With respect to the question whether the lease is void because it was not enrolled within six calendar months after the execution thereof, which is an objec-

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tion that arises on the statute of the 9th Geo. 2, my opinion is that I ought not to send any case to a court of law on that point: because the precise point was determined in *Walker* v. *Richardson*: and I must say that it is my own opinion that the question was rightly decided in that case. It is plain that what was meant by the statute, was to repress the testamentary disposition of land to charitable purposes, and also to enforce the statutes of mortmain. But, if the land be already in mortmain, it is altogether out of the consideration of the Legislature.

The question then having been solemnly decided in a court of law, and my opinion upon it being in accordance with that decision, I ought not to direct it to be again discussed.

RICKETT v. GUILLEMARD.

1841: 27th March.

Will. Construction. Survivorship.

Testator gave 800 *l.* to the four children of *H. R.*, to be divided into equal shares, and paid to them at 21, and the interest of their shares to be paid, to their parents, in the meantime: and, in case of either of the legatees dying under 21, then his, her or their shares were to be equally divided amongst the survivors. Two of the children died under 21 in the testator's lifetime. Held that the two survivors were entitled to the *original* share only of the child who died last.

A TESTATOR gave to *Mary Rickett*, *H. Rickett*, *T. Rickett*, and *J. Rickett*, the sons and daughters of *Henry Rickett*, 800 *l.* stock to be divided into equal shares and to be paid to them as they should respectively arrive at the age of 21 years; and the dividends and interest of their respective shares to be paid, to their parents, in the meantime: and in case of either of the

before-mentioned legatees dying before attaining the age of 21 years, then he directed that his, her or their shares should be equally divided among the survivors. Two of the children died under 21 in the testator's lifetime. The question was whether the two surviving children, who were the Plaintiffs in the cause, were entitled to that portion of the share of the child who died first, which survived to the child who died last.

Mr. *Simpkinson* and Mr. *Anderdon*, for the Plaintiffs, cited *Walker* v. *Main* (*a*); *Willing* v. *Baine* (*b*); *Humphreys* v. *Howes* (*c*); *Mackinnon* v. *Peach* (*d*).

Mr. *Jacob* appeared for the Defendant.

The VICE-CHANCELLOR:

The clause in the will which has been relied on by the counsel for the Plaintiffs, is not sufficiently extensive to give over shares accruing by survivorship.

On the death of the child who died last, his *original share* went over to the two surviving children; but his one third of the share of the child who died first, lapsed.

(*a*) 1 Jac. & Walk. 1.
(*b*) 3 P. W. 113.
(*c*) 1 Russ. & Myl. 639.
(*d*) 2 Keen, 555.

1841:
30th March.

Practice.
Feme coverte.
Process.
Attachment.

An attachment ordered to be issued against a married woman, for disobeying an order in a suit which she had instituted by her next friend.

OTTWAY *v.* WING *.

WING *v.* OTTWAY.

THE Plaintiff in the original cause was a married woman, who sued by her next friend; and the bill was, in effect, for an injunction to restrain *Wing* from levying execution on her separate estate for a debt due by her before marriage. The cross cause was to enforce *Wing's* equitable charge on the separate estate, and for an account and a sale.

The parties compromised the matter; and an order was made, whereby it was declared that *Wing* had an equitable charge, on Mrs. *Ottway's* separate estate, for the amount of his demand therein specified; and it was ordered that *the Plaintiff Caroline Ottway* should, within four days after service of a writ of execution of the order, pay to *Wing* the sum of 300*l.*, part of his said demand.

A writ of execution was served and the money not paid. The usual affidavit was made; but the Registrar objected to the issuing of an attachment without the express direction of the Court.

Mr. *Coleridge* mentioned the case to the *Vice-Chancellor*, and stated that Mrs. *Ottway* was here in the character of a *feme sole*, and that the order was made upon her as Plaintiff. He referred to *Bunyan* v. *Mor-*

* *Ex relatione*, Mr. *Coleridge*.

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timer (*a*), where it was clear the order would have been made, if the married woman, a Defendant, had been previously directed to answer separately. In this case Mrs. *Ottway*, by her own act, had placed herself under the liabilities of a *feme sole*. He also mentioned *Bell* v. *Hyde* (*b*).

The *Vice-Chancellor*, after conferring with the Registrar, observed that Mrs. *Ottway* having, as Plaintiff, constituted herself a single woman for the purpose of the suit, she must take the consequences of disobeying the orders of the Court made upon her as Plaintiff; and his *Honor* gave leave to issue the attachment against her as a *feme sole*.

(*a*) Madd. & Geld. 278. (*b*) Prec. in Chanc. 328.

STOKES *v.* WILSON.

1841: 31st March.

Practice. Injunction.

The Court refused to extend the common injunction to stay trial, where the Plaintiff in equity was served with notice of trial on the 28th of January, but did not file his bill till the 16th of March, and made the motion on the commission-day of the assizes at which the action was to be tried.

MOTION to extend the common injunction to stay trial.

The action was commenced in August, and notice of trial was served on the 28th of January. On the 16th of March the bill was filed; and *Stokes*, having obtained the common injunction, moved, on this day (which was the commission-day at *Chester* where the action was to be tried) to extend it to stay trial.

Mr. *Knight Bruce* in support of the motion.

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Mr. *Wigram* and Mr. *Koe* opposed it on the ground that the Defendant had been guilty of *laches* in not filing his bill earlier than the 16th of March, although he had been served with notice of trial so long ago as the 28th of January. They added that the day on which the motion was made, was the commission-day at *Chester*, and that the action was expected to be tried on the day following. *Blacoe* v. *Wilkinson* (*a*); *Field* v. *Beaumont* (*b*); *Thorpe* v. *Hughes* (*c*).

Mr. *Knight Bruce*, in reply, said that, if there had been any delay, his client was willing to give ample security for the costs which the Plaintiff in the action might have incurred in consequence of it.

The *Vice-Chancellor* said that this was a case of greater negligence than *Thorpe* v. *Hughes*, and refused to grant the application even on the terms of *Stokes* giving security for costs.

Motion refused with costs.

(*a*) 13 Ves. 454. (*b*) 3 Madd. 102; and 1 Swans. 204.
(*c*) 3 Myl. & Cr. 742.

JACKSON *v.* MARJORIBANKS.

1841: 2d April.

Will. Construction. Remoteness.

Testator gave his real and personal estates to trustees, and directed them to invest his personal estate in the purchase of land, and to pay the rents, subject to certain annuities, to his son, for life; and, in case his son should die, leaving behind him no legitimate issue, then he directed the trustees to pay the rents to his, the testator's, widow for life; but in case his son should die leaving behind him legitimate issue, then, at the end of six months after the eldest male child *then living* of his son, should have attained *twenty-five*, or, in default of male issue, the eldest female child then living of his son, should have attained twenty-one, to convey all the estates to the eldest male child, or, in default of male issue, to the eldest female child and *to his or her heirs of his or her body lawfully begotten, absolutely for ever.* The testator then (in case his son should die during the minority of such eldest male or female child) provided for their maintenance out of the rents until he or she should attain the respective ages before mentioned, and then declared that, in case his son should not die during such minority, his estates should continue on the trusts aforesaid until six months after his son's death, and then pass to his son's eldest male or female child in manner before expressed; and in case his son should die leaving no legitimate issue, then that the trustees should, after the death of the testator's wife, convey the estates to certain other persons. The testator's son married, and had a son born after the testator's death. The Court held the trust for the grandson not to be void for remoteness; and the grandson having survived his father and attained twenty-one (but being under twenty-five), and all the annuitants being dead, ordered the estates to be conveyed to him.

WILLIAM COLLINS JACKSON, by his will dated the 15th of November 1808, gave, devised and bequeathed unto and to the use of trustees, their heirs, executors, administrators and assigns respectively, all his freehold messuages, lands, tenements and hereditaments whereof he was seised in fee, as well as all those his copyhold lands, messuages, tenements and hereditaments, which he had surrendered to the use of his will, situate in the parish of *Langley Marsh*, in the county of *Buckingham*, upon the trusts thereinafter declared concerning the same: and he gave and bequeathed all his leasehold estates, as well for lives as

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for years, together with all his personal estate, to the same trustees, their heirs, executors and administrators respectively, according to the nature of the several estates, upon the trusts thereinafter declared concerning the same: (that is to say) upon trust, within 10 days after his decease, to pay 800*l.* to his wife, *Jane Jackson*, and to surrender to her disposal certain goods and chattels therein specified: and upon further trust to sell and dispose of, within one year after his decease or as soon after as possible, all his landed estates, (except the estate situate in the parish of *Langley Marsh*), and all his property in the funds, East India stock, and bonds and mortgages, together with all his personal estate, save as thereinbefore excepted, and to apply the produce in the purchase of freehold lands on which there should be no capital mansion, in one of the counties of *Buckingham*, *Hertford*, *Berks*, *Surrey*, *Kent*, or *Middlesex*, upon trust, out of the rents, interests, rights and profits arising from the freehold lands so directed to be purchased, and also out of the rents, interests, rights, issues and profits arising and accruing from the estate in the parish of *Langley Marsh*, to pay, in the first instance, an annuity of 800*l.* to his wife *Jane Jackson* during her life: and upon further trust to pay, in the second instance, one other annuity of 100*l.* to his mother, *Eliza Jackson*, during her life: and upon further trust to pay, in the third instance, one other annuity of 500*l.* to his son, *William Collins Burke Jackson*, during his life; and, if it should happen that the rents, issues, interests, rights, profits and advantages of all his estates should not be equal, with the aforesaid incumbrances thereon, to the full payment of the said annuity of 500*l.* to his son, then he directed that the surplus of the said rents, issues &c. after the payment of the annuities to his wife and mother, and

after all legal deductions, should be delivered over to his son, *William C. B. Jackson*, for his own use and benefit during his life: and upon further trust, in the event of either or both of the annuities of 800 *l.* and 100 *l.* falling in by the death of the annuitants, then he directed that the amount of the annuity so falling in, should be transferred to his son, *William C. B. Jackson*, for his own use and benefit during his life, in addition to the annuity of 500 *l.*: and upon further trust that, in case his son, *William C. B. Jackson*, should depart this life leaving behind him no legitimate issue, then that the trustees should pay the whole of the said rents, issues and profits to his wife, *Jane Jackson*, during her life, except the annuity of 100 *l.* to his mother, *Eliza Jackson*: and upon further trust that, in case his son, *William C. B. Jackson*, should depart this life leaving behind him legitimate issue, then that the trustees should, *at the end of six months after the eldest male child then living of the body lawfully begotten of his said son, William C. B. Jackson, should have attained the age of* 25 *years*, or, in default of male issue, the eldest female child then living of the body lawfully begotten of his said son *W. C. B. Jackson*, should have attained the full age of 21 years, *convey*, assign and transfer, in such manner as counsel should advise, *all his said estates*, together with all rents, interests, rights, profits and advantages accruing or that might have accrued therefrom, *unto the said eldest male child*, or, in default of male issue, unto the said eldest female child, *and to his or her heirs of his or her body lawfully begotten absolutely for ever*, subject to and chargeable nevertheless with the payment of the annuities of 800 *l.* and 100 *l.* as aforesaid: and upon further trust that, in case his said son *W. C. B. Jackson* should depart this life during the minority of the said eldest male child or the said eldest

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female child, as the case might be, then his will was that, from and after the decease of his said son, the annual sum of 500*l.* should be appropriated for the maintenance and education of such eldest male child or of such female child, as the case might be, until he or she should have attained their respective ages already expressed and declared; provided nevertheless that the appropriation of such annual sum, should not interfere with the two annuities of 800*l.* and 100*l.*: and upon this further trust that, in case his son should not depart this life during the minority of the said eldest male child or the said eldest female child, as the case might be, then that all his said estates should continue on the trusts aforesaid until six months after the decease of his said son *William C. B. Jackson*, and, at the expiration of that period, pass to the said eldest male child or to the said eldest female child, as the case might be, in the way and manner already expressed and declared; and upon this further trust that, in case his said son *William C. B. Jackson* should depart this life leaving behind him no legitimate issue, then, at the expiration of six months after the decease of his wife *Jane Jackson*, the trustees should convey, assign and transfer, by such advice as aforesaid (there being at the time no lineal descendant of his, the testator's, body lawfully begotten) all his said estates, together with all rents, issues, interest, rights, profits and advantages accruing or that might have accrued therefrom, unto certain other persons in manner therein mentioned: and the testator appointed the trustees, his executors.

The testator died in 1814 leaving his son named in his will, his only child, his heir at law and customary heir, and his mother and wife him surviving. The testator's son married in December 1815, and had issue a

daughter and a son: the former was born on the 22d of October 1816, and the latter, who was the Plaintiff in the cause, was born on the 14th of December 1817. The testator's mother died a few years after the testator. His son died in March 1828. The Plaintiff attained 21 on the 13th of December 1838; and on the 30th of the same month the testator's widow died.

On the 8th of March 1839, the bill was filed against the trustees of the will, praying that it might be declared that the Plaintiff *was absolutely entitled* to the real estates devised by the will, and also to the estates which the trustees had purchased, with the testator's personal estate, since his death, in pursuance of his will; and that the trustees might convey and surrender the estates, *and the fee simple* and inheritance thereof, to the Plaintiff *absolutely*.

The cause was heard on the 29th of May 1840, and a decree was then made according to the prayer of the bill.

The trustees afterwards presented a petition to have the cause re-heard as to that part of the decree which declared that the Plaintiff was entitled to the real estates which had been purchased, with the testator's personal estate, since his decease, in pursuance of the trusts of his will*, and which directed the petitioners to convey and surrender those estates to the Plaintiff and his heirs; the petitioners being advised that, by reason *of the remoteness and invalidity of the devise to the*

* It was through inadvertence that the decree, as drawn up, directed the estates to be conveyed and surrendered to the Plaintiff in fee and not in tail. The Plaintiff being the testator's heir, the estates of which the testator *was seised at his death*, would have descended to the Plaintiff if the devise had been void: consequently, the petition was confined to the *purchased* estates.

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Plaintiff, the purchased estates resulted to the testator's next of kin.

The cause now came on to be re-heard.

Mr. *Jacob* and Mr. *Shadwell*, for the Plaintiff, said that the devise was not void for remoteness, but was good on the authority of *Boraston's* case (*a*): which had been followed in *Bromfield* v. *Crowder* (*b*); *Doe* v. *Nowell* (*c*); *Phipps* v. *Williams* (*d*); *Snow* v. *Poulden* (*e*); *Doe* v. *Ward* (*f*); *Edwards* v. *Hammond* (*g*); *Manfield* v. *Dugard* (*h*); *Doe* v. *Lea* (*i*); *Doe* v. *Moore* (*k*).

Mr. *K. Bruce* and Mr. *W. M. James*, for the Defendants, contended that the trust in the will of which the Plaintiff claimed the benefit, was void for remoteness; as it was not intended to be performed until after the eldest male child of *W. C. B. Jackson, who should be living at his decease*, should have attained 25, which age the Plaintiff had not even yet attained. *Cogan* v. *Stevens* (*l*); *Ackers* v. *Phipps* (*m*): that at all events, the question was so doubtful, that it ought not to be decided without the testator's next of kin being brought before the Court.

The VICE-CHANCELLOR:

I admit, as was said, by Lord *Brougham* in *Phipps* v. *Williams*, that, when land and personalty are devised

(*a*) 3 Rep. 19.
(*b*) 1 New R. 313.
(*c*) 1 M. & S. 327.
(*d*) *Ante*, Vol. V. p. 44.
(*e*) 1 Keen, 186.
(*f*) 9 Adol. & Ell. 582.
(*g*) 3 Levinz, 132; 2 Show. 398.
(*h*) 1 Eq. Abr. 195.
(*i*) 3 T. R. 41.
(*k*) 14 East, 601.
(*l*) Lewin on Trustees, Appendix, 698.
(*m*) 9 Bli. 430; 3 Cl. & Fin. 665.

together, with a direction to invest the personalty in the purchase of land, the rule which governs the devise of the land, must be applicable also to the personalty which is to be invested in the purchase of land. But as I think that, in this case, any claim that might be made by the next of kin, could not be sustained, it would be unjust, to the Plaintiff, if I were to direct the cause to stand over with a view to the next of kin being brought before the Court, in order that they might have a decision pronounced against them. I admit, however, that the trustees were quite justified in submitting to the Court, the question which they have raised by the petition of rehearing.

This case is precisely within the principle of *Boraston*'s case: and though, on first reading that case, one is astonished at the decision, still, as it has been followed in *Bromfield* v. *Crowder* and in the other cases cited for the Plaintiff, my opinion is that I am not at liberty to escape from it. The decree, therefore, must be affirmed.

1841:
22d April.

Practice.
Motion.

After answer, the bill was amended and a plea was put in to the amended bill. Held that the original bill having been answered, the pendency of the plea to the amended bill, did not prevent the hearing of a motion for a receiver.

THOMPSON *v.* SELBY*.

THE original bill was amended after it had been answered; and a plea was put in to the amended bill.

Mr. *Lovat* and Mr. *Coleridge*, for the Plaintiff, moved for a receiver.

Mr. *Knight Bruce* and Mr. *Hare*, for the Defendant, said that the pendency of the plea, prevented the motion being heard: 2 Dan. Prac. 219.

The VICE-CHANCELLOR:

As the original bill has been answered, I think that I am at liberty to hear the motion notwithstanding there is a plea pending to the amended bill.

* *Ex relatione.*

PETERS *v.* DIPPLE.

1841: 23d April.

Will. Construction.

Testatrix gave an annuity of 50*l.* to her son in law, for his life, provided he remained unmarried, but if he should marry, the annuity to cease; and, after his death or second marriage, whichever should first happen, she gave 1,000*l.* to be equally divided between her brother and sisters: and, if they should not all be then living, she gave the share of him, her or them so dying to be equally divided between them her surviving brother and sisters. The testatrix's brother and sisters all died in her son in law's lifetime, and he died unmarried. Held that the the 1,000*l.* as

ANN PARR, by her will, gave an annuity of 50*l.* to her son in law, *Robert Green*, to be paid to him during his life, provided he should so long remain single and unmarried; but, if he should thereafter marry, then she directed that the annuity should cease and be no longer paid from the time of such marriage: and, from and after the decease of *Robert Green* or his marriage, whichever should first happen, she gave the sum of 1,000*l.* to be equally divided between her brother and sisters; and, if they should not all be then living, she gave and bequeathed the share of him, her or them so dying to be equally divided between them her surviving brother and sisters: and she gave the residue of her personal estate to her brother in law, *Matthew Peters*.

Matthew Peters and *Robert Green* survived the testatrix: and she left a brother and four sisters living at her death; but they all died in *Robert Green*'s lifetime. He died in August 1834, without having married after the date of the will.

The bill was filed by some of the residuary legatees under the will of *Matthew Peters* (who also was dead) against the representatives of the testatrix's brother and sisters and other parties, alleging that the testatrix's brother and sisters having died before the death or marriage of *Robert Green*, the legacy of 1,000*l.* lapsed and became part of the testatrix's residuary estate; and praying that a sum of stock in which the 1,000*l.* had been invested, might be transferred to the Plaintiffs as repre-

brother and sisters took a vested interest in tenants in common.

1841.

PETERS v. DIPPLE.

senting the residuary legatees under *Matthew Peters*'s will.

The cause was heard as a short cause.

Mr. *Knight Bruce*, Mr. *James Parker* and Mr. *Craig*, for the Plaintiffs, contended that the bequest on which the question raised by the bill, arose, was not a gift of the interest of a sum of money to one for life, with a bequest of the principal to others, on his death; but that it was a gift of an annuity followed by a bequest of a sum in gross, which was contingent on the legatees being alive at the marriage or death of the annuitant. *Harrison* v. *Foreman* (*a*); *Billingsley* v. *Wills* (*b*); *Pope* v. *Whitcombe* (*c*); *Smell* v. *Dee* (*d*); *Norris* v. *Huthwaite* (*e*).

Mr. *Simons*, Mr. *Paynter*, and Mr. *E. Montagu* appeared for the Defendants.

The *Vice-Chancellor* said that the gift in question, was, in effect, a gift in remainder, and declared that the testatrix's brother and sisters took vested interests in the 1,000 *l.*, as tenants in common, equally.

(*a*) 5 Ves. 207.
(*b*) 3 Atk. 219.
(*c*) 3 Russ. 124.
(*d*) 2 Salk. 415.
(*e*) 1 Bro. C. C. 182, note.

LLOYD *v.* WAIT*.

1841 : 23d April.

Practice. Production of deed.

A., claiming to be heir to a mortgagor, filed a bill to redeem. The answer denied that he was heir. A motion by him, for production of the mortgage-deed, was refused, because he had not established his title.

THE bill was filed, to redeem a mortgage, by a person claiming to be heir *ex parte paternâ* to the mortgagor. The Defendants were the heir *ex parte paternâ* and the administrator of the mortgagor; and they had redeemed the mortgage and taken an assignment of it to themselves.

The answer denied that the Plaintiff sustained the character in which he sued.

Mr. *Shebbeare*, for the Plaintiff, moved that the Defendants might be ordered to produce the mortgage-deed.

Mr. *Roupell*, for the Defendants, submitted that, as the title of the Plaintiff was denied, he must prove it before he could have a right to see the deed.

Mr. *Shebbeare*, in reply, cited *Hue* v. *Richards* (*a*).

The VICE-CHANCELLOR:

As the title of the Plaintiff is denied, he must establish it before he can be entitled to see the deed; that is, he must first show that he has an interest in the deed.

Motion refused with costs.

* *Ex relatione.*

(*a*) 2 Beav. 305.

IN RE LINGEN.

1841 : 1st May.

Practice. Stat. 6 *Anne*, *c.* 18. *Cestui que vie.*

Course of proceeding under 6 Anne, c. 18, to compel a lessee *pur autre vie*, to produce the *cestui que vie* to the reversioner.

ON the 22d of December 1840, an order was obtained, under 6th Anne, c. 18, s. 1*, by a person

* This Act is intituled: "An Act for the more effectual discovery of the death of persons pretended to be alive to the prejudice of those who claim estates after their deaths." It enacts: "that any person or persons who hath or shall have any claim or demand in or to any remainder, reversion, or expectancy, in or to any estate, after the death of any person within age, married woman, or any other person whatsoever, upon affidavit made in the High Court of Chancery, by the persons so claiming such estate, of his or her title, and that he or she hath cause to believe that such minor, married woman, or other person is dead, and that his or her death is concealed by such guardian, trustee, husband, or any other person, shall and may, once a year if the person aggrieved shall think fit, move the *Lord Chancellor*, Keeper, or Commissioners for the custody of the Great Seal of *Great Britain* for the time being, to order, and they are hereby authorized and required to order such guardian, trustee, husband, or other person, concealing or suspected to conceal such person, at such time and place as the said Court shall direct, on personal or other due service of such order, to produce and show to such person and persons (not exceeding two) as shall in such order be named by the party or parties prosecuting such order, such minor, married woman, or other persons aforesaid; and, if such guardian, trustee, husband, or such other person, as aforesaid, shall refuse or neglect to produce or show such infant, married woman, or such other person, on whose life any such estate doth depend, according to the directions of the said order, that then the Court of Chancery is hereby authorized and required to order such guardian, trustee, husband, or other person, to produce such minor, married woman, or other person concealed, in the said Court of Chancery, or other-

entitled to certain property, in reversion expectant on the determination of a lease thereof *pur autre vie*, for the production of the *cestui que vie* by the lessee, to two persons named in the order, at the church-door of the parish, on the 8th of January 1841, between the hours of 10 and 12 in the forenoon.

The lessee was served with the order, but did not produce the *cestui que vie*; as appeared by affidavit and by the return made by the two persons to whom the *cestui que vie* was ordered to be produced. Whereupon another order was obtained, commanding the lessee to produce the *cestui que vie*, at the bar of the Court, at the sitting of the Court, at 10 o'clock in the morning of the 1st of May 1841. The lessee having disobeyed this order as well as the former one,

Mr. *Blunt*, by whom the orders had been obtained, said that the Registrar doubted whether the Act did not

wise before Commissioners to be appointed by the said Court, at such time and place as the Court shall direct, two of which Commissioners shall be nominated by the party or parties prosecuting such order, at his, her, or their costs, and charges; and, in case such guardian, trustee, husband, or other person shall refuse, or neglect to produce such infant, married woman, or other person, so concealed, in the Court of Chancery, or before such Commissioners, whereof return shall be made by such Commissioners, and that return filed in the Petty Bag Office, in either or any of the said cases, the said minor, married woman, or such other person so concealed, shall be taken to be dead, and it shall be lawful for any person claiming any right, title, or interest, in remainder or reversion, or otherwise, after the death of such infant, married woman, or such other persons so concealed, as aforesaid, to enter upon such lands, tenements, and hereditaments, as if such infant, married woman, or other person so concealed, were actually dead."

1841.

In re LINGEN.

require that some return to the last order, should be made into the Petty Bag Office, before an order entitling the reversioner to enter on the demised premises, could be drawn up.

The VICE-CHANCELLOR:

I apprehend that all that is necessary, is that the Registrar should insert a minute, in the book of the proceedings of this Court, that, on this day, at the sitting of the Court at 10 o'clock in the morning, no person represented to be the *cestui que vie*, was produced or appeared.

1841: 5th May.

Practice. Costs. Petition.

If a petition is presented under an Act of Parliament by a person who is out of the jurisdiction, the respondent may require security to be given for costs, notwithstanding he has answered the affidavits in support of the petition.

EX PARTE SEIDLER.

THIS was a petition presented under an Act of Parliament authorizing the Court to make an order, on petition, in a summary way.

The petitioner being out of the jurisdiction of the Court, and the respondent having answered the affidavits in support of the petition, the question was whether he had thereby lost his right to require the petitioner to give security for costs.

The *Vice-Chancellor* ruled that he had not, but that he might make the application on the petition coming on to be heard.

WALDO *v.* WALDO.

1841: 5th May.

Timber. Tenant for life and remainder-man.

Estates were devised to *A.* in fee, in trust to settle them on *B.* for life, remainder to *C.* for life, *without impeachment of waste*, remainder to *C.*'s first and other sons in tail. Soon after the testator's death, *A.*, with the consent of *B.* & *C.*, cut and sold some timber on the estates which was going to decay, and invested the proceeds in consols. Afterwards a suit was instituted by *C.* against *A.* *B.* and *C.*'s infant eldest son, in which the stock was ordered to be transferred into Court. The Court having ascertained the circumstances under which the timber had been cut, ordered the dividends of the stock to be paid to *B.* for life; and, afterwards, *B.* having died, the capital to be transferred to *C.*

THE testatrix in the cause, by her will dated the 8th of June 1827, devised her manor of *Heaver*, in *Kent*, and all other her estates in that county and elsewhere, to *S. N. Meredith* and his heirs, upon trust, as soon as conveniently might be after her decease, to convey the manor and other estates to the use of the Defendant *Jane Waldo*, now deceased, for her life (but she not to have any power of cutting down more timber than was merely necessary for repairs), with remainder to the use of trustees to preserve &c., with remainder to the use of the Plaintiff, *Edmund Wakefield Mead Waldo*, for life, without impeachment of waste, with remainder to the use of trustees to preserve &c., with remainder to the Plaintiff's first and other sons, successively in tail, with divers remainders over, with the ultimate reversion or remainder to the testatrix's right heirs.

The testatrix died in December 1829. Shortly after her death, Mr. *Meredith*, with the consent of *Jane Waldo* and the Plaintiff, caused some timber on the devised estates, which a surveyor employed by him had marked as being fit and proper to be cut owing to the same having arrived at maturity and being in an incipient state of decay, to be felled and sold, and the proceeds to be invested in the three per cent. consols.

1841.

WALDO v. WALDO.

In September 1831, *Meredith* made a settlement of the estates pursuant to the directions of the will.

By the decree made on the hearing of the cause on the 5th of July 1834, the stock purchased with the timber-money was ordered to be transferred into Court, and the *Master* was directed to inquire as to the circumstances under which the timber had been cut. The *Master* reported that the timber was in a decaying state, and was cut under the circumstances above stated; that none of it had been planted for the purpose of, or was calculated to serve for ornament or shelter to the mansion-house on the estates; and that the timber which remained uncut, was amply sufficient for future repairs.

By the decree made on the hearing for further directions, dated the 30th of January 1835, the Defendant, *Jane Waldo*, was declared entitled to and was ordered to be paid the dividends of the stock, during her life; and, after her death, any person or persons entitled to or interested in the stock were to be at liberty to apply, to the Court, concerning it, as they should be advised*.

Jane Waldo died on the 28th of December 1840, having received all the dividends of the stock which became due in her lifetime. The Plaintiff then presented a petition in the cause, praying that the capital of the stock, and a dividend which had accrued thereon since *Jane Waldo*'s death, might be transferred and paid to him. The petition now came on to be heard.

* See *ante*, Vol. VII. p. 261.

Mr. *Knight Bruce*, Mr. *Jacob*, and Mr. *Osborne*, in support of the petition:

The Court has already decided that, owing to the superintending authority of the trustee, the cutting of the timber was not a wrongful act; and, that being the case, it must be considered, in this Court, as still standing; and the Court will take care that the rights of the Plaintiff, who has now become tenant for life in possession, without impeachment of waste, shall not be prejudiced by an act which it has sanctioned and adopted. If the timber were still standing, the Plaintiff would be entitled to cut and sell it for his own benefit; and, therefore, he is entitled to the sum of stock which now represents the timber. *Lewis Bowles*'s case (*a*); *Pyne* v. *Dor* (*b*); *Wickham* v. *Wickham* (*c*); *Cockerell* v. *Cholmeley* (*d*).

Mr. *Girdlestone* and Mr. *Tennant*, for the Defendant *Edmund Waldo Mead Waldo*, the Plaintiff's eldest son, who was an infant:

The act of cutting down the timber, was a wrongful act, which instantly enured to the benefit of the party entitled, not to the next estate for life, but to the inheritance; he being the only party entitled to take advantage of the wrongful act.

In *Udal* v. *Udal* (*e*) it was resolved: "that, if there be tenant for life, the remainder for life, and tenant for life cut down timber trees, he that hath the inheritance

(*a*) 11 Rep. 79 b; *see* 7th Resolution, p. 82 b.
(*b*) 1 T. R. 55.
(*c*) 19 Ves. 419.
(*d*) 1 Russ. & Myl. 418; S. C. 3 Bing. 207, nom. *Cholmeley* v. *Paxton*.
(*e*) Aleyn, 81.

1841.

WALDO v. WALDO.

may seize them, although he cannot have an action of waste during the life of him in remainder; for the particular tenant hath not the absolute property in the trees, but only a special interest in them so long as they continue annexed to the land. And therefore a termer cannot grant away his term excepting the trees, but the exception is void, for that he cannot have a distinct interest in them, but only relative to the land." *Paget*'s Case is to the same effect (*f*). In *Butler*'s Notes to Co. Litt. 218 b. the law on the subject is thus laid down: "No person is entitled to an action of waste against a tenant for life, but he who has the immediate estate of inheritance in remainder or reversion expectant upon the estate for life. If, between the estate of the tenant for life who commits waste and the subsequent estate of inheritance, there is interposed an estate of freehold to any person *in esse*, then, during the continuance of such interposed estate, the action of waste is suspended; and, if the first tenant for life dies during the continuance of such interposed estate, the action is gone for ever. Yet, if the waste be done by cutting down trees &c., such remainder-man in fee may seize them, and, if they are taken away or made use of before he seizes them, he may bring an action of trover; for, in the eye of the law, a remainder-man for life has not the property of the thing wasted." In *Robinson* v. *Litton* (*g*), it was laid down, by Lord *Hardwicke*: "that, where there is tenant for life, subject to waste, remainder for life dispunishable for waste, remainder in fee, the Court will not suffer an agreement between the two tenants for life to commit waste, to take place against the remainder-man, before the time comes when the

(*f*) 5 Rep. 76. (*g*) 3 Atk. 209.

second tenant for life's power commences." *Garth* v. *Cotton* (*h*) is to the like effect, and is precisely this case.

Mr. *Briggs* appeared for the trustees.

Mr. *K. Bruce* in reply:

In the cases which were first cited for the infant tenant in tail, it does not appear whether the tenants for life in remainder, were impeachable or unimpeachable of waste; and in the absence of words to the contrary, they must be taken to have been impeachable of waste. The cases cited from *Atkyns*, show that the Court will not allow the *collusive* cutting of timber between two tenants for life, the one impeachable and the other unimpeachable of waste, to the disherison of the reversioner or remainder-man. In both those cases however it is said that the remainder-man for life unimpeachable of waste, must wait until his estate comes into possession.

The VICE-CHANCELLOR:

I do not recollect that this precise point has ever before been brought before the Court.

I remember very well that when the case of *Tooker* v. *Annesley* (*i*) was brought before me, I felt compelled, by the mode in which Sir *E. Sugden* argued the case, to look into all the cases on the subject; and they amounted only to this, that, where this Court does interfere when timber has been cut, it will go on to make an application of the produce of the timber, which constitutes a part of the inheritance, by investing it in the

(*h*) 3 Atk. 751. (*i*) *Ante*, Vol. V. p. 235.

1841.

WALDO v. WALDO.

three per cents., and will order the dividends to be paid to the party entitled in possession.

This case must be determined by analogy to what is the law on the subject. The whole law, as far as the tenant for life unimpeachable of waste is concerned, is expressed thus in the 7th resolution in *Lewis Bowles's* case:

"The clause of *without impeachment of waste*, gives a power, to the lessee, which will produce an interest in him if he executes his power during the privity of his estate." I take this to be a correct statement of the law on this subject.

Where there is an estate settled on one for life unimpeachable for waste, with remainder over; and there is a power of sale to be exercised with the concurrence of the tenant for life, that power is not allowed to be exercised in this manner, namely, by selling the whole estate, and excepting the value of the timber from the whole purchase-money and paying that to the tenant for life. That very case occurred, nearly 40 years ago, before Sir *W. Grant*, who held that a tenant for life who had an option of cutting timber, could not sell or concur in a sale of the whole estate, and have excepted out of it the value of the timber*. That case is only an authority where there is a tenant for life unimpeachable of waste.

Where, by the act of the Court, or the act of a trustee out of Court which the Court has adopted, timber, which is part of the inheritance, has been converted into consols and the Court has dealt with the fund as repre-

* See also *Cockerell* v. *Cholmeley*, 1 Russ. & Myl. 418.

senting the inheritance, by giving, in commutation for the rights of the tenant for life impeachable of waste, the interest produced by the investment in Consols, I think that, where the estate of the tenant for life has ceased, the Court has only to consider the estate of the person next in succession; and, if he is unimpeachable of waste and asks for the corpus of the fund, he asks only for that which he would have been entitled to if he had exercised that power which the law gives him a right to exercise when he comes into possession. In strict analogy to this, when the estate of the person in remainder comes into possession in the shape of an estate for life unimpeachable of waste, the person having that estate is entitled to take that portion of the inheritance which is represented by the proceeds of the timber cut.

1841.

WALDO
v.
WALDO.

SELWAY *v.* CHAPPELL.

1841:
5th May.

Practice.
Witness.

THE Defendent, after a witness had been examined for the Plaintiff under a commission, discovered that the witness was interested in the result of the suit.

The *Vice-Chancellor*, on an application made by Mr. *Jacob* and Mr. *Follett* for the Defendant, and opposed by Mr. *James Parker* for the Plaintiff, gave the Defendant liberty to take out a new commission, directed to the old commissioners, and to exhibit interrogatories for examining or cross-examining the witness as to his interest, and for examining other witnesses to the same point, with liberty to the Plaintiff to cross-examine those witnesses: the costs of the application and of the new commission to be paid by the Defendant.

After a witness had been examined for the Plaintiff, the Defendant discovered that he was interested in the result of the suit. The Defendant was allowed to issue a new commission for examining the witness and other persons to prove the fact.

1841.

SELWAY v. CHAPPELL.

Vaughan v. *Worrall* (*a*) was cited in support of the application.

(*a*) 2 Madd. 322; and 2 Swans. 395.

The incompetency of witnesses on account of interest, is now removed by 6 & 7 Vict. c. 85: and, by the same Act, a Plaintiff in equity is enabled to examine a Defendant as a witness, whether he is a mere formal party or not.

SIR WM. PILKINGTON, BART. *v.* BOUGHEY.

1841: 7th May.

Mortmain. Charity. Trust. Will. Construction.

Testator, after limiting his *Staffordshire* estates to his daughter and her sons in strict settlement, recited that he had lately purchased an estate called *C.* for the purpose of endowing a chapel, but that he had been prevented from carrying his intention into effect: he then devised the *C.* estate to trustees, in trust to apply the rents upon such trusts and for such purposes as the persons for the time being in possession of his *Staffordshire* estates, should, in their discretion, appoint; but he trusted that, out of respect to his memory, they would exercise such power in doing such charitable acts as they knew he would most approve of. Held that both the subject and the object of the trust were clearly pointed out, and that the latter being charitable acts, the trust was void under the Statute of Mortmain.

THOMAS SWINNERTON, the testator in the cause, by his will dated the 4th of August 1829, devised his capital mansion house, and estates at *Butterton* in *Staffordshire*, to his daughter, Lady *Pilkington*, the wife of Sir *William Pilkington*, for life, with remainders to her first and other sons in tail, with remainders to his daughter the Defendant, Mrs. *Tynte*, and her sons in like manner: and, after reciting that he had then lately purchased an estate called *Coalamore*, situate in the parish of *Stoke-upon-Trent*, in the county of *Stafford*, for the purpose of endowing a private chapel, which he intended to build upon some part of his estate at *Butterton*, adjoining his house there, but that certain

difficulties had arisen which prevented him from carrying his intention into effect; he directed that, in case, at the time of his decease, such chapel should not be built and endowed, (as was the case,) then such estate should be and enure, and he thereby gave and devised the same unto and to the use of the Defendants Sir *Thomas Boughey* and *Francis Twemlow*, their heirs and assigns, upon trust that they and the survivor of them and the heirs and assigns of such survivor, should, from time to time, receive the rents, issues and profits thereof, and apply the same to such uses, upon such trusts and for such ends, intents and purposes as Lady *Pilkington*, or Mrs. *Tynte*, or the person or persons for the time being entitled to the immediate freehold in possession of his *Staffordshire* estates, should in her, his or their discretion direct or appoint; *but he trusted that, out of respect to his memory, they would exercise such power in doing such charitable acts as they knew he would most approve of.*

Mr. *James*, for the Plaintiffs, Sir *William* and Lady *Pilkington*, submitted that the language used by the testator, was such as to give, to Lady *Pilkington*, the beneficial interest, in the *Coalamore* estate, unfettered with any trust for charity or any other purpose: that there was a careful anxiety pervading the clause, which showed that the testator was aware that, if he imposed any trust for charity, he would be doing a void act: that no objects were pointed out for whose benefit the rents were to be applied, but it was left to Lady *Pilkington*'s uncontrolled discretion to apply them as she might think fit. *Sale* v. *Moore* (*a*); *Meredith* v.

(*a*) *Ante*, Vol. I. p. 534.

1841.

PILKINGTON v. BOUGHEY.

Heneage (*b*); *Gibbs* v. *Rumsey* (*c*). This last case shows that Lady *Pilkington* may, if she pleases, appoint the rents to herself.

Mr. *Hodgson*, Mr. *Daniell* and Mr. *Twemlow* appeared for the other parties; but

The VICE-CHANCELLOR, without hearing them, said:

The testator recites that he had lately purchased the *Coalamore* estate for the purpose of endowing a private chapel which he intended to build upon some part of his estate at *Butterton* in *Staffordshire*, but that certain difficulties had arisen which prevented him from carrying his intention into effect. He then directs that, in case the chapel should not be built and endowed at his death, then the *Coalamore* estate should be and enure to the use of Sir *Thomas Boughey* and *Francis Twemlow*, their heirs and assigns, in trust to apply the rents of that estate to such uses and purposes as Lady *Pilkington*, or Mrs. *Tynte*, or the person or persons for the time being entitled to the freehold in possession of his *Staffordshire* estates, should, in her, his or their discretion, direct or appoint; but he trusted that, out of respect to his memory, they would exercise such power in doing such charitable acts as they knew he would most approve of. The testator, therefore, on the face of his will, tells us that he had purchased the *Coalamore* estate with the intention of endowing a chapel, but that he had been prevented from carrying his intention into effect; and then he directs the trustees to apply the rents of that estate for such purposes as

(*b*) *Ante*, Vol. I. p. 542. (c) 2 V. & B. 294.

1841.

PILKINGTON v. BOUGHEY.

the persons for the time being in possession of his *Staffordshire* estates, should in their discretion think fit; but he trusts that they will exercise the power in doing such charitable acts as they knew he would most approve of. In the first place, therefore, the subject is plainly pointed out, namely, the rents and profits of the estate: and, in the second place, the only thing that you can collect as to his intention with regard to the mode in which the power given to the parties in possession of his *Staffordshire* estates, was to be exercised, is that it should be exercised in doing such charitable acts as they knew he would most approve of. It is clear, therefore, that the testator intended the rents to be applied for charitable purposes. Consequently the object, namely, charity, is clearly pointed out, as well as the subject; and the trust is void under the Statute of Mortmain; and the estate will pass to the right heirs of the testator.

1841:
6th, 7th, and 26th May, and 10th June.

Vendor and purchaser. Sale under decree. Solicitor. Fraud.

A party to a suit, who was also a solicitor, and had the conduct of a sale decreed by the Court, purchased at the sale, under a feigned name. The Court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which the party had purchased it, and, if there should be no higher bidder, the party to be held to his purchase.

SIDNY *v.* RANGER.

BY the decree made in two Causes, an estate at *Lamberhurst* in *Kent*, called the *Cold Harbour* estate, was directed to be sold, and Sir *W. R. Sidny*, who was a Plaintiff in one of the Causes and a solicitor, took upon himself the carriage of the decree and the conduct of the sale. The estate was sold by auction in August 1833, for 600*l.*; but that sum being considered much below its value, Sir *W. R. Sidny* caused the biddings to be opened: and the estate was resold in March 1834. At the resale Sir *William Robert Sidny* purchased the estate for himself, but in the name of *John King*: and, in March 1838, he obtained an order confirming the purchase, and paid the purchase-money for the estate and for the timber on it, into Court in the same name.

The parties to the two suits having discovered that *Sidny* was the real purchaser at the resale, a petition was presented, by the Defendant *Ranger*, stating, in addition to the circumstances above detailed, that *Sidny* had cut down and sold some of the timber on the estate, and that the sums which *Sidny* had paid for the estate and the timber on it, were much less than their real values, and praying that the estate, with the timber thereon, might be resold before the *Master*; and, in case the same, at such resale, should not produce a sum equal to the purchase-money paid by *Sidny*, exclusive of the timber, that *Sidny* might be held to his purchase; and that the costs of such resale and of the present application, and incident thereto and consequent thereon, might be directed to be paid by him: and that,

in case he should not be held to his purchase, the aforesaid costs, together with the amount of the timber cut down and sold by *Sidny*, might be deducted out of his purchase-money and paid into the Bank to the credit of the Causes, and the residue thereof repaid to *Sidny*; and that the *Master* might be directed to appoint another solicitor to conduct the resale.

Sidny made an affidavit in opposition to the petition, contradicting the allegation that he had purchased the estate for less than its value, and stating that his reason for purchasing the estate in a feigned name, was that some of the parties to the suits were hostile to him, and he did not wish them to know that he was the purchaser.

Mr. *G. Richards* and Mr. *Stone* appeared for the petitioner, and

Mr. *Willcock* for Mrs. *Munns*, another party, who supported the petition. They cited *Domville* v. *Berrington* (*a*); *Ex parte Lacey* (*b*); and *Owen* v. *Foulkes* (*c*), as authorising the Court to make an order according to the prayer of the petition.

Mr. *Wakefield* appeared for Sir *W. R. Sidny*, and

Mr. *Knight Bruce* and Mr. *Jacob* for other parties, who did not object to the purchase. They referred to *Elworthy* v. *Billing* (*d*), and said that the prayer of the petition was inconsistent with itself; as it sought both to repudiate and to adopt the purchase: that, if the

(*a*) 2 Youn. & Coll. 723.
(*b*) 6 Ves. 625.
(*c*) Ibid. 630, note.
(*d*) *Ante*, Vol. X. p. 98.

1841.

SIDNY v. RANGER.

purchase was irregular, the Court must set it aside at once, and not contingently.

The VICE-CHANCELLOR:

There is quite enough, in this case, to bring Sir *W. R. Sidny* within the principle of those cases which decide that persons standing in the situation of trustees, cannot buy for themselves. But, before I finally dispose of the case, I will direct search to be made for the case of *Owen* v. *Foulkes*, in order that I may ascertain whether it authorises me to make such an order as is prayed by this petition.

The VICE-CHANCELLOR:

10th June. I have seen the case of *Owen* v. *Foulkes*, and I think that it justifies me in making an order according to the prayer of the petition in this case. Sir *W. R. Sidny* ought to have obtained the leave of the Court, before he bid for the estate.

The biddings must be re-opened, and the estate must be again offered for sale. If there is a higher bidder, that person must be the purchaser; but, if not, Sir *W. R. Sidny* must be held to his bargain. In short, an order must be made similar, as far as is compatible with the circumstances of the case, to the order in *Owen* v. *Foulkes*. I shall not make any order as to costs, until I know the result of the resale.

The following order was drawn up: Order that the *Cold Harbour* estate in the pleadings mentioned, be put up to auction at the sum of 670*l.* (the price at which

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Sir *W. R. Sidny*, in the name of *John King*, was allowed, by the order made in these causes, dated the 14th of November 1833, to open the former biddings for the said estate), and be again resold: and it is ordered that the person, if any, that shall be reported as better bidder for the same by the *Master*'s further report, within ten days from the time of such bidding, other than the said Sir *William Robert Sidny* being so reported, make a deposit after the rate of ten per cent. on his bidding (the amount to be ascertained by the said *Master*) into the bank, with the privity of the Accountant-general of this Court, to be there placed to the credit of these causes, subject to the further order of this Court. And, upon the new bidder making such deposit by the time aforesaid, it is ordered that the said Sir *William Robert Sidny* be discharged from his said purchase: and it is ordered that so much of the bank three per cent. annuities as shall or may be then standing in the name of the Accountant-general of this Court in trust in these causes, as will be sufficient to raise the sums of 1,140*l.* 19*s.** and 163*l.* 10*s.*, the amounts of the purchase monies paid into the bank to the credit of these causes by the said Sir *William Robert Sidny*, for the said estate and timber, and also the amount of the costs, charges and expenses paid by him for the opening of the said former biddings for the said estate and by reason of his having become and being reported purchaser as aforesaid of the said estate, after deducting therefrom the amount received by him for timber sold by him off the said estate, such amounts to be respectively ascertained by the said *Master* who is to certify the amount thereof, be sold with the privity of the said Accountant-general; and one of the

* The above order was correctly extracted from Reg. Lib.

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cashiers of the bank is to have notice to attend and receive the money to arise by the said sale, who, upon receipt thereof, is to pay the same into the bank with the privity of the said Accountant-general, to be there placed to the credit of these causes: and it is ordered that the money to arise by such sale, when so paid into the bank, be paid to the said Sir *William Robert Sidny*: and, for the purposes aforesaid, the said Accountant-general is to draw on the bank according to the form prescribed by the Act of Parliament and the general rules and orders of this Court in that case made and provided: but, in default of such new purchaser making such deposit by the time aforesaid, it is ordered such new bidding be void; or, in case there shall be no better bidder, it is ordered that the said Sir *William Robert Sidny* do complete his said purchase: and it is ordered that the said *Frances Munns** do thereupon execute a conveyance of the said estate to the said Sir *William Robert Sidny*; such conveyance to be settled by the said *Master* in case the parties differ about the same. And this Court doth reserve the costs of this application: and any of the parties are to be at liberty to apply to this Court as there shall be occasion.

Reg. Lib. B. 1840, fo. 745.

The estate was resold in October 1841, and was purchased, by a gentleman named *Parker*, for 1,400*l.*, exclusive of timber: and, that sum being more than double the price which Sir *W. R. Sidny* had paid for the estate, he was ordered to pay the costs reserved by the above order.

* The trustee for sale of the estate.

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1841: 27th May.

Will. Construction. Children.

Testatrix bequeathed 1,300*l.* to trustees in trust, as to one third, for such of *the children* of *A. S.* then deceased, as should be living at the testatrix's death; and, in trust, as to the remaining two thirds, for the children of *S. T.* and *T. P.* living at the same time. *S. T.* had grandchildren, but no child living either at the date of the will or at the testatrix's death: but *A. S.* and *T. P.* had, each of them, children living at those times. Held that the grandchildren of *S. T.* could not claim the benefit of the trust.

THE testatrix in the Cause, by her will dated the 24th of March 1838, directed that her executors and trustees should, at the expiration of six calendar months next after her decease, *out of the monies to be produced from her leasehold and personal estates thereinafter to them given, retain the sum of* 1,300 *l.*, and should stand possessed thereof upon the trusts thereafter declared concerning the same: and she devised all her freehold messuages, burgages, or dwelling houses and hereditaments at *Stockton*, in the county of *Durham* (which formed the whole of her real property), unto and to the use of the trustees, their heirs and assigns, in trust, as soon as conveniently might be after her decease, absolutely to sell, convey and dispose of the same premises; and to stand possessed of the money to arise therefrom, and of the rents and profits thereof until such sale, and of the sum of 1,300*l.* thereinbefore directed to be retained by them, upon trust, as to one

Will.—Stat. 7 *Will.* 4, *and* 1 *Vict. c.* 26.—*Construction.—Revocation.*

Testatrix devised all her freehold messuages &c. in *S.* to trustees in trust to sell and stand possessed of the proceeds in trust for *A.*, and gave the residue of her personal estate, to the trustees, in trust for *B.* After the date of her will she sold the houses and conveyed them to the purchaser, and he deposited the conveyance and title deeds thereof with her, to secure part of the purchase-money. Held that the security and the money due on it did not pass, under 7 Will. 4 & 1 Vict. c. 26, s. 23 (the late Will Act), to the trustees in trust for *A.*, but to the trustees in trust for *B.*

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equal third part thereof, for such of the children of *Ann Stonehouse* widow, then deceased (the late aunt of the testatrix's late husband) as should be living at the time of the decease of the testatrix, equally to be divided between or among them, if more than one: and, as to one other third part thereof, the testatrix directed that the same should be in trust for *such of the children of Susanna Taylor* (who was another aunt of her late husband), as should be living at the time of the testatrix's decease, equally to be divided between or amongst them, if more than one; and, as to the remaining one third part thereof, that the same should be in trust for *Thomas Peacock*; but, if he should die in her lifetime (an event which happened) the same one third part should be in trust for such of his children as should be living at the time of the testatrix's decease, equally to be divided between or amongst them, if more than one: and the testatrix bequeathed all her messuages, lands and hereditaments, situate in the township of *Billingham* or elsewhere and held under several leases for 21 years under the Dean and Chapter of *Durham*, to the trustees, in trust, as soon as conveniently might be after her decease, to sell the same, and to pay, apply and dispose of the proceeds in manner and for the purposes thereinafter expressed: and, after bequeathing certain legacies, she gave all her ready money and money upon securities, plate, china, linen and household furniture, and all other her estate and effects whatsoever and wheresoever, to the trustees, in trust to sell and dispose of, get in and convert the same into money, and to stand possessed of the money to arise therefrom, upon trust thereout to pay her funeral and testamentary expenses, and all the debts which she should owe at the time of her decease, and the sum of 1,300 *l.* thereinbefore directed to be retained, and the several other legacies thereinbefore given; and she

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declared that the residue of the same trust monies should be upon trust, as to two equal fourth parts thereof, to invest the same in the usual securities, and to pay the dividends, interest &c. thereof to her nephew, the Plaintiff *James Moor*, during his life; and that, after his decease, the same two-fourth parts should be in trust for his child and children then living and thereafter to be born, who should attain 21. Provided that if all the children of the Plaintiff *James Moor* then living and thereafter to be born, should die before any of them should attain the age of 21 years, then the same two fourth parts should be upon the same trusts as were thereinafter expressed concerning the fourth part of the last-mentioned residue which was thereinafter declared to be in trust for her nephew the Plaintiff *Thomas Darnell* and his children. The testatrix then declared the same trusts, as to another fourth part of the residue, for *Thomas Darnell* and his children, as she had declared, as to the two fourth parts, for *James Moor* and his children. And she directed that, after the decease of *Thomas Darnell*, the income of the shares, of such of his children as should be under 21, in the same fourth part, should be applied for their maintenance. Provided that if all the children of *Thomas Darnell* then living and thereafter to be born, should die under 21, then the same fourth part should be upon the trusts thereinbefore declared, concerning the two fourth parts, for *James Moor* and his children. The testatrix then declared that the remaining fourth part of the residue should be in trust for her nephew, *John Darnell* since deceased, during his life, and that, after his decease, one moiety thereof should be upon the same trusts as were thereinbefore declared, concerning the two fourth parts, for *James Moor* and his children, and the other moiety thereof, upon the same trusts as were thereinbefore declared, concern

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ing the fourth part, for *Thomas Darnell* and his children. And she gave, to her trustees, their heirs and assigns, all such real estates as, at the time of her death, should be vested in her by way of mortgage, in order to enable them with greater ease and convenience to recover, receive and get in the monies secured by such mortgages for the purposes of her will.

In November 1838, the testatrix agreed to sell, to *Thomas Plews*, the freehold houses and premises at *Stockton* mentioned in her will, in consideration of 350 *l.* and of an annuity of 6 *l.* 10 *s.* for her life. Afterwards she consented to take a promissory note for the 350 *l.*; and, accordingly, *Plews* signed and gave to her a note, dated the 23d of November 1838, in the following words: "Borrowed and received, of Mrs. *Elizabeth Peacock*, the sum of 350 *l.*; which I promise to repay to her or her order on demand, with interest for the same after the rate of 5 *l.* for 100 *l.* for a year."

By indentures of lease and release, dated the 14th and 15th of February 1839, the testatrix conveyed the houses and premises at *Stockton* to a trustee in fee, in trust, out of the rents, to pay the annuity to the testatrix, during her life, and, subject thereto, in trust for *Plews*, in fee. The 350 *l.* was mentioned in the release to have been *paid* by *Plews* to the testatrix.

Upon the execution of the conveyance, the testatrix required *Plews* to give her some further security for the 350 *l.*; and, thereupon, *Plews* deposited with her the conveyance and title-deeds of the houses and premises, and signed a memorandum, dated the 22d of February 1839; and, thereby, after reciting the contract for the purchase of the houses and premises and the conveyance

made in pursuance thereof, and that, it being inconvenient for *Plews* to pay the 350*l.* as expressed in the release, the testatrix had consented to take his promissory note for that sum, on having the deeds relating to the houses and premises deposited with her: it was witnessed that *Plews* agreed that the deeds should remain in the testatrix's custody, for better securing the 350*l.* and interest; and *Plews* also agreed, at the request of the testatrix, her executors &c. to convey the houses and premises to the testatrix in fee, by way of mortgage, for more effectually securing the payment, of the 350*l.* with interest, to the testatrix, her executors &c.

The testatrix died on the 27th of April 1840. The annuity was paid up to her death, but the 350*l.* remained due on the securities above mentioned.

Susanna Taylor had no child living at the date of the will or at the testatrix's death; but she had six grandchildren then living. All the other persons whose children were provided for by the will, had children living at the two periods abovementioned.

The bill was filed by *James Moor* and *Thomas Darnell*, who were the nephews and next of kin of the testatrix, alleging that, inasmuch as there was no *child* of *Susanna Taylor* living at the date of the will or at the testatrix's death, the bequest of one-third part of the 1,300*l.*, entirely failed, and the sum of 433*l.* 6*s.* 8*d.*, being such one third part, *was undisposed of*, and the Plaintiffs were entitled to it as the testatrix's next of kin: that the devise of the houses and premises at *Stockton*, in trust to sell and to stand possessed of the produce in trust for the children of *Ann Stonehouse* and *Susanna Taylor* and

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for *Thomas Peacock* and his children, was revoked by the sale to *Plews*, and that the 350*l.*, secured by his note and by the deposit of the deeds, formed part of the surplus trust-monies bequeathed for the benefit of the Plaintiffs and *John Darnell*, and the children of the Plaintiffs: that the Defendants, *Susanna Taylor*'s grandchildren, pretended that they were entitled to the 433*l.* 6*s.* 8*d.*; but the Plaintiffs charged that those Defendants being grandchildren of *Susanna Taylor*, could not take under the description of her children, and consequently the 433*l.* 6*s.* 8*d.* was undisposed of: that the Defendants, the children of the Plaintiffs, pretended that that sum was not undisposed of, *but was included in the surplus trust-monies bequeathed in trust for the Plaintiffs and their children*: but the Plaintiffs charged that *that surplus was expressly exclusive of the* 1,300*l.* *of which the* 433*l.* 6*s.* 8*d.* *formed a part*, and that there was no general residuary bequest sufficient to include the 433*l.* 6*s.* 8*d.*: that the Defendants, the children of *Ann Stonehouse* and of *Thomas Peacock*, and the six grandchildren of *Susanna Taylor*, pretended *that the devise of the houses and premises at Stockton, was not revoked by the sale thereof by the testatrix in her lifetime, and that the interest which the testatrix had in those houses and premises at her death, as the equitable mortgagee thereof, passed, by her will, to her trustees, upon the same trusts as were thereby declared respecting those houses and premises*, and that the 350*l.* secured by the equitable mortgage, did not form part of the testatrix's personal estate at her death, or that it did not pass under the bequest of her personal estate, but that the same was then subject to the trusts declared, by the will, respecting the produce of the sale of the houses and premises in case the same had remained to be sold, by the trustees, after the death of the testatrix: but the

Plaintiffs charged *that the* 350*l. was a mere debt due to the testatrix at her death, and that the same formed part of her personal estate,* and that the equitable mortgage was a mere security, and the 350*l.* passed under the bequest, and was subject to the trust declared of all her money on securities; and that all the interest which the testatrix had in the houses and premises at her death, passed, to the trustees, under the devise of estates vested in her by way of mortgage; and that such interest was vested in the trustees in trust to get in the monies secured thereby for the purposes of her will: that, if the Court should be of opinion that the 350*l.* was subject to the same trusts as were declared respecting the produce of the sale of the houses and premises in case the same had remained to be sold by the trustees after the testatrix's death, then the bequest of one third part of that sum, had failed in consequence of there being no child of *Susanna Taylor* living at the testatrix's death; and that the Plaintiffs were entitled to it as the testatrix's next of kin, or, at all events, that such one third, as well as the 433*l.* 6*s.* 8*d.* were subject to the trusts declared, by the will, for the benefit of the Plaintiffs and their children. The bill prayed for declarations and relief founded on the above-mentioned charges.

The Defendants, the grandchildren of *Susanna Taylor,* and the children of *Ann Stonehouse* and of *Thomas Peacock,* in their answers said that the testatrix was, at her death, entitled to an equitable interest in the houses and premises at *Stockton,* as equitable mortgagee; that, inasmuch as *Plews* never paid his purchase-money of 350*l.* to the testatrix, but the same was due and owing to her at the time of her death, on the security of the promissory note and of the equitable mortgage of the

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houses and premises, the devise thereof to her trustees upon trust to sell and divide the produce in manner in the will mentioned, was not revoked by the sale to *Plews* in her lifetime; but that the interest to which the testatrix was entitled, at her death, in the houses and premises as such equitable mortgagee, and also the 350*l.*, the purchase-money remaining unpaid, passed to the trustees of the will, upon the same trusts as were declared respecting the houses and premises and the produce of the sale thereof. And *Susanna Taylor*'s grandchildren submitted that, inasmuch as *Susanna Taylor* was dead at the date of the will, and was therein mentioned as a person deceased*, and, as there was no child of *Susanna Taylor* living at the date of the will, her grandchildren living at the death of the testatrix, were entitled to take the benefit of the bequest in trust for her children living at the death of the testatrix; and that, under those circumstances, they ought to be declared entitled, in equal shares, to one-third of the 350*l.*, and of the interest accrued thereon since the death of the testatrix.

The Defendants, the children of the Plaintiffs, in their answer, submitted that the one-third of the 1,300*l.* to which the children of *Susanna Taylor* (if there had been any) would have been entitled, was not undisposed of, but formed part of the testatrix's residuary personal estate, and was included in the surplus trust-monies bequeathed for the benefit of the Plaintiffs and their children.

Mr. *Faber*, for the Plaintiffs:

The first question is with respect to the one-third of the 1,300*l.*, which the testatrix bequeathed in trust for

* She was not so mentioned in the will as set forth in the brief.

the children of *Susanna Taylor*. Mrs. *Taylor* had no children living either at the date of the will or at the testatrix's death; but she had six grandchildren then living; and it will be contended that they are entitled to that one-third. I submit, however, that they are not entitled to it; for the language of the will shows, plainly, that the testatrix, when she used the word "children," used it in its correct sense. There is nothing to show that she meant grandchildren by it.

The next question is with respect to the 350 *l.*, which still remains secured by *Plews*'s note of hand and by the equitable mortgage, made by him, of the houses at *Stockton*. As the testatrix sold and conveyed those houses after the date of her will, there could be no doubt, before the passing of the late Act for the amendment of the laws with respect to wills (7 W. 4th and 1 Vict. c. 26), that the will, so far as it related to those houses, would have been revoked. But it will be said that, as there is an equitable mortgage for securing 350 *l.* part of the purchase-money for the houses, that sum is subject to the same trusts as the money produced by the sale of the houses would have been subject to, if the sale had taken place after the testatrix's death: and the 23d sect. of the Act will be relied upon in support of that argument (*a*).—[The *Vice-Chancellor*:—The object of that section is to prevent conveyances in the nature of fines and recoveries from operating as a

(*a*) That section enacts, that no conveyance or other act made or done, subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

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revocation of the will, as to the estates comprised in those conveyances. It applies also to cases in which a testator makes a mortgage in fee after the date of his will, and, on paying off the mortgage, takes a reconveyance of the estate to uses to bar dower.]

Mr. *Roundell Palmer*, for the grandchildren of *Susanna Taylor*:

There can be no doubt that, before the passing of the Act referred to, the sale and conveyance of the houses to *Plews*, would have been an entire revocation of the will so far as it relates to those houses: but the 23d section has abrogated the old rule of law, that a change of interest in the property devised, operates as a revocation. The doctrine of revocation implies that there is something which, but for the act which is said to be an act of revocation, the words of the will would pass; and, by using the word in this case, it seems to be admitted that, but for some such act, there is such an interest as the devise in question would operate upon. The act relied on, is the conveyance and change of interest. But the 23d section of the Act of Parliament enacts that no conveyance of property made subsequently to the execution of a will, shall prevent the operation of the will with respect to such interest in the property as the testator shall have power to dispose of, by will, at his death: and, by the third section, testators are enabled to dispose of all property which they shall be entitled to, either at law or in equity, at the time of their deaths. Now, if the conveyance to *Plews* was not a revocation (as, under the 23d section, it certainly was not), what other act was done, in this case, which was a revocation? The Act of Parliament defines, expressly, what acts shall revoke a will. They are marriage, an express revocation by some writing duly executed as a

will, burning, tearing or otherwise destroying the will by the testator or by some person in his presence and by his direction with the intention of revoking the same (*b*); but none of those acts was done in this case. Again, the 24th section declares that every will shall be construed, with reference to the real estate and the personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. Consequently the devise now under consideration, must be construed as if the testatrix had given, to her trustees, all the interest in the houses at *Stockton*, which she might have or be entitled to at the time of her death, unless there is some intention, apparent on the will, which is repugnant to that construction: which there is not. So far from it, that construction will best effectuate the testatrix's intention in favour of her deceased husband's relations, which is strongly marked in the will. There is nothing inconsistent with that intention in her having anticipated the act which she had directed to be done by her trustees, that is, the sale of the property. In *Wall* v. *Bright* (*c*) a general devise in trust to sell, was held to carry an estate which the testator had sold and for which he had received part of the purchase-money, but had not executed any conveyance of the estate to the purchaser.

The only question in this case that can be argued for a moment, is whether the words of the devise, taking them to be spoken at the testatrix's death, describe the interest which she then had in the houses, sufficiently to pass it. Can there be any doubt, if she had never had any other interest in the houses, and

(*b*) *See* sects. 18 and 20. (*c*) 1 Jac. & Walk. 494.

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had no other houses at *Stockton*, that the words of the devise would have passed it; or that they would have passed it, if the will had been made subsequently to the conveyance to *Plews?* In *Clarke* v. *Abbot* (*d*) a mortgagee in fee of an inn at *Chelsea*, devised all his freehold messuages and garden grounds in *Chelsea*: and the question was whether the mortgaged interest would pass by that description. It was held, by Lord *Hardwicke*, that it certainly would pass; as it did not appear that the testator had any other land there, *ut res magis valeat quam pereat*. That, like this, was a case of an equitable not a legal interest. In order to give effect to the part of the will on which I am now commenting, that construction must have been adopted, in the present state of the law, even though the testatrix had not been interested at all in these houses at the date of her will, but had afterwards become interested in them, or if the interest which she had at the date of her will, had ceased entirely, and, at a later period, she had acquired a new interest by means of this equitable mortgage. *A fortiori* must that construction be adopted where her interest has been continuous. It is laid down, by Mr. *Hayes*, in his observations on the new Will Act (*e*): "that a devise or bequest of a specific subject of property, will pass whatever interest in that subject may be disposable by the testator at his death; and the gift will, consequently, be operative notwithstanding an absolute sale of the subject, provided any interest in the same subject, although a new and even a different interest, be disposable by the testator at his death: and a devise or bequest of a specific subject of property, or of a specific interest in property, will even pass

(*d*) 2 Eq. Ab 606, pl. 41.

(*e*) *See* Introduct. to Conveyancing, 5th edit. vol. 1, p. 390.

(without re-execution or republication) whatever subject or interest, disposable by the testator at his death, may then happen to answer the description; and the gift will, consequently, be operative, notwithstanding an absolute sale of that subject or interest, provided some subject or interest to which the language of the description is pertinent, be disposable, by the testator, at his death." Sir *E. Sugden* lays down the very point which I am contending for. He says (*f*): "In a case like that of *Arnald* v. *Arnald* (*g*), where a testator devises his estate to trustees to sell and pay the money to certain legatees, and afterwards sells the estate himself, which we have seen, under the old law, was an ademption, the distinction would now seem to be this, that, if the money has not been received by the testator, it will pass to the legatees; because, notwithstanding the act done by the testator, namely, the sale, the will is still to operate on the estate or interest in the estate which the testator has power to dispose of by will at his death; and he has power, at that time, to dispose by will of the purchase-money and has a lien on the estate for it, which he can also dispose of, and the case of the legatees is rather strengthened than weakened by the 24th section. But, if the testator has received the money, the ademption appears to be beyond the reach of the statute: the testator has no longer any interest in the property given by his will, although his general personal estate is increased by the sale, and the case does not seem to be aided by the 24th section."

Next I have to submit that, under the circumstances of this case, the grandchildren of Mrs. *Taylor* are

(*f*) 1 Treat. on Vendors, 10th edit. p. 304. See *post*. 140, note.
(*g*) 1 Bro. C. C. 401.

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entitled to the benefit of the trust expressed in favour of the children of that lady.

I admit that, *primâ facie*, the word, "children," can not be held to include any issue except legitimate children. But this construction may be displaced by showing a different intention, either on the face of the will, or by evidence, which places the Court in the position of the testator, and enables it to decide according to the sense in which the testator must have used the word. The principle is, in every case, to give effect to the intention; assigning to the words their strict, legal signification wherever they will bear it; and, where they will not, construing them in that sense in which the testator must, of necessity, have used them himself. That principle was recognised in *Lett* v. *Randall* (*h*). In all cases where an entire class is described, and there are any of that class who can take, they take exclusively. But where, in order to give any effect at all to the bequest, it is necessary to give a more extensive sense to the words of the will, the Court will deviate from their strict meaning and put that more extensive construction upon them. *Radcliffe* v. *Buckley* (*i*); *Slade* v. *Fooks* (*k*); *Lord Woodhouselee* v. *Dalrymple* (*l*); *Gill* v. *Shelley* (*m*). In *Wild's* case (*n*) the word "children" was construed to mean "issue;" and, in a case in 8 *Vin. Ab.* 310, pl. 9, a grandson was held to be entitled under the description of "son." The cases of *Gale* v. *Bennett* (*o*), *Royle* v. *Hamilton* (*p*), *Reeves* v. *Brymer* (*q*), and *Crooke* v.

(*h*) *Ante*, Vol. X. p. 112.
(*i*) 10 Ves. 195.
(*k*) *Ante*, Vol. IX. p. 386.
(*l*) 2 Mer. 419.
(*m*) 2 Russ. & Myl. 336.
(*n*) 6 Rep. 16 b.
(*o*) Amb. 681.
(*p*) 4 Ves. 437.
(*q*) Ibid. 692.

Brookeing (*r*), recognise *the principle* upon which, as I submit, this case ought to be decided.

Mr. *Cory* appeared for the children of the Plaintiffs: and

Mr. *Wilson* for the trustees and executors of the will.

Mr. *Faber*, in reply, said that the testatrix, in disposing of the houses at *Stockton*, spoke of them as being property which was in her own ownership: that, construing the will according to the directions of the Act of Parliament, that is, to speak and take effect as if it had been executed immediately before the testatrix's death, the expression, "money upon securities," which the testatrix had used in her will, would apply, most aptly, to the 350*l.*, and the words: "all such real estates as, at the time of my decease, shall be vested in me by way of mortgage," would include the interest which the testatrix had in the houses at the time of her death *.

The VICE-CHANCELLOR:

I do not find any thing, in this will, which makes it necessary for me to construe the word "children," as meaning any other individuals than those who strictly bore the character of children. It is plain that, in several instances, the testatrix has used that word in its proper sense: and, therefore, I am not at liberty to put a different construction upon it in that part of the will where the children of Mrs. *Taylor* are spoken of.

* The question whether one third of the 1,300*l.* was undisposed of, seems not to have been argued.

(*r*) 2 Vern. 106.

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Next: with respect to the houses at *Stockton*. The testatrix has devised them to the trustees, in trust to sell the same as soon as conveniently might be after her decease; and has directed the trustees to stand possessed of the proceeds upon certain trusts for the benefit of the children of Mrs. *Stonehouse* and Mrs. *Taylor*, who should be living at her decease, and also for the benefit of *Thomas Peacock*, and of his children living at the same time. The testatrix sold the houses after the date of her will, and conveyed them to the purchaser. But the purchaser being unable to pay 350 *l.*, part of the purchase-money, the testatrix consented to accept a deposit of the title-deeds of the houses, as a security for the money remaining unpaid. And it was said that, under the 23d sect. of the late Act for the amendment of the law with respect to wills, the interest which the testatrix had in the houses, at the time of her death, by virtue of the equitable mortgage, and the money secured by the mortgage, pass to the trustees in trust for the children of Mrs. *Stonehouse* and Mrs. *Taylor*, and for *Thomas Peacock* and his children. It is clear, however, that, according to any construction that can be put upon the Act of Parliament, the will has been revoked as to the devise in trust to sell. Then the Act says that no conveyance or other act made or done, subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, *except an act by which such will shall be revoked as aforesaid*, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of at the time of his death. So that there is an express exception of the case where the testator shall have revoked the will; and, on the ground of that exception, my opinion is that the property in question is

taken out of the operation of the general enactment contained in the clause of the Act which has been relied on. That clause applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee, and afterwards take a reconveyance of them to themselves and a trustee to uses to bar dower; but the clause does not apply to cases like the present, where the thing meant to be given, is gone.

The will in this case, though revoked by the sale, has operation on the property in another form: for, by the sale, the testatrix changed the nature of the property from realty to personalty; and the money produced by the sale passes as part of her general personal estate.

Declare that the 350*l.* formed part of the testatrix's personal estate at her death, and that the trustees of her will ought to stand possessed of that sum and of the securities for the same, upon the trusts declared, by the will, respecting the monies to arise from the sale and conversion into money of her leasehold and other personal estate and effects: Declare that the trustees ought to stand possessed of one third of the 1,300*l.* in trust for the Defendant *J. Routledge* as the personal representative of *J. Stonehouse* deceased, the only child of *Ann Stonehouse* living at the testatrix's death; and of one other third in trust for the Defendants *Elizabeth Richardson* and *Ann Stansfield*, the only children of *Thomas Peacock* living at the testatrix's death, in equal moieties: Declare that the bequest of the other third to such of the children of *Susanna Taylor* as should be living at the testatrix's death, wholly failed; and that

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it forms part of the general residue of the testatrix's personal estate *.

* In *Farrar* v. *Lord Winterton* (ROLLS 1842) a testatrix devised a freehold estate in June 1838, and afterwards agreed to sell it; but died before the contract was completed. Lord *Langdale* held that the unpaid purchase-money belonged not to the devisee, but to the executors.

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1841: 27th May, 17th June, and 7th July.

Practice. Subpœna. Substitution of service. Defendant.

If a Defendant who is out of the jurisdiction, has given special authority to a person within the jurisdiction to act as his agent with respect to the property which is the subject of the suit, the Court will order service of the subpœna to appear and answer, on that person, to be good service on the Defendant.

THE bill prayed that the Plaintiffs, Messrs. *Hobhouse & Co.*, might be declared to be entitled to a charge or lien, in respect of a debt of 14,000 *l.* and upwards, upon certain wines which the Defendant *Emilia Sheil*, of *Xeres* in *Spain*, widow, had consigned to the Defendants Messrs. *Courtney & Co.*; and that the wines might be sold and the proceeds applied in satisfaction of the debt.

Subsequently to the creation of the lien sought to be enforced, Mrs. *Sheil* became bankrupt, and the Defendants *De Giles* and *De Perea*, of *Xeres*, were appointed assignees of her estate and effects, by the Chamber of Commerce in that city; and they claimed the wines, freed from the lien. In consequence of which the Plaintiffs' solicitor, in December 1840, wrote a letter to them, explaining the nature of the charge claimed by the Plaintiffs, and the circumstances under which it had been created. No notice was taken of this letter until April 1841, when Mr. *Annesley*, a solicitor, called on the Plaintiffs' solicitor, for the purpose of having some communication with him, respecting the Plaintiffs' claim to the wines; and Mr. *Annesley* then stated that he was employed and instructed by a gen-

tleman who had come over to this country with a power of attorney from the assignees; and that it was of the most extensive kind, giving power to him to prosecute and defend any suits in this country, in relation to the rights of the assignees in reference to Mrs. *Sheil*'s property and effects in this country, and also to the claims of the Plaintiffs. The gentleman alluded to by Mr. *Annesley*, was an inhabitant of *Xeres*, named *MacMahon*; and, in April 1841, he called on Messrs. *Courtney*, and stated *that he was authorised, by the assignees, to demand the stock of wines*, property and effects belonging to the creditors of Mrs. *Sheil*, and, generally, to wind up her affairs; and he then offered to show the power of attorney under which he acted, to Messrs. *Courtney*.

On the 27th of May, The *Vice-Chancellor*, on the application of Mr. *Sharpe*, for the Plaintiffs, ordered that service on *MacMahon* of the subpœna for the assignees to appear to and answer the bill in this cause, should be deemed good service on the assignees.

On the 17th of June a motion was made, on behalf of the assignees, to discharge that order. After notice of that motion had been served, an affidavit was made by the solicitor for the Plaintiffs, stating he had been informed and believed that part of the wines sought to be made liable to the charge or lien in favour of the Plaintiffs, had been consigned, by Mrs. *Sheil*, to Messrs. *Moore, Hanson & Co.* of *Bristol*, on account of the Plaintiffs*; and such wines were, as the deponent believed, still in their possession: that *MacMahon*, since the service of the subpœna on him, had sent the following letter to *Moore, Hanson & Co.*:

"Gentlemen, "London, 3d June.

"The authority that the power of attorney the as-

* So in brief.

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signees of the failed house of Widow *Sheil* of *Xeres*, have conferred on me for liquidating the property you hold of shipments of wines consigned to you, being recognised to be sufficient for any proceedings I may consider necessary to undertake in the Courts of this country on behalf and in the names of said assignees of Mrs. *Sheil*, I take the liberty to request you will be pleased to furnish me the requisite accounts of all the property and monies in your hands, and the disposal thereof, amounting, as per annexed statement, to 645*l.* Expecting your kind answer, I remain, &c."

Mr. *Wigram* and Mr. *Anderdon*, in support of the motion, said that the Court had no jurisdiction to make the order. They referred to *Rickcord* v. *Nedriff* (*a*); *Smith* v. *The Hibernian Mine Company* (*b*); *Waterton* v. *Croft* (*c*); *Roberts* v. *Worsley* (*d*). In this last case the Defendant had appeared to and answered the original bill. The Plaintiff afterwards amended his bill; at which time the Defendant was out of the jurisdiction of the Court. A motion was then made, for the Plaintiff, that service of the subpœna to appear to and answer the amended bill, upon the Defendant's clerk in Court in the original suit, might be deemed good service upon the Defendant: the *Master of the Rolls*, however, decided that the Court had no power to order the substituted service. It is hardly possible to conceive a stronger case than that: for, there, the Defendant had answered the original bill. In *Bond* v. *The Duke of Newcastle* (*e*), Lord *Thurlow* refused to order the subpœna to be served upon the Defendants' clerk in Court, although the Defendants had filed a bill relative to the

(*a*) 2 Mer. 458.
(*b*) 1 Scho. & Lef. 238.
(*c*) *Ante*, Vol. V. p. 502.
(*d*) 2 Cox, 389.
(*e*) 3 Bro. C. C. 386.

same subject by the same clerk in Court: *Wellins* v. *Lomans* (*f*); *Anderson* v. *Lewis* (*g*). The cases which we have cited were decided by Lord *Thurlow*, Lord *Redesdale*, Lord *Kenyon*, Lord *Eldon*, and other eminent Judges in this Court; and there is nothing to oppose to them except *English* v. *Hendrick* (*h*), in which the order was obtained *ex parte*. If the Court had jurisdiction to make such an order as the one in question, the Legislature would not have done so useless an act as to pass the 2d & 3d Will. 4, c. 33 (*i*), and 4th & 5th Will. 4, c. 82 (*k*).

Mr. *Knight Bruce* and Mr. *Sharpe*, for the Plaintiffs:

The Acts of Parliament which the counsel in support of the motion have referred to, relate to the service of process out of the jurisdiction of the Court, and not, as the present case does, to the service of process within the jurisdiction.

The question whether substituted service of the process of the Court ought or ought not to be ordered, is a question, not of jurisdiction as it has been said to be, but of discretion; and it was so treated by Lord *Eldon* and by Lord *Redesdale*; as is evident from the observations made by those learned Judges respectively, in *Smith* v. *The Hibernian Mine Company*, and *Rickard* v. *Nedriff*. Moreover, in the former of those cases, the power of attorney which had been given, by the

(*f*) 2 Dick. 579.

(*g*) 3 Bro. C. C. 429; and 2 Dick. 776.

(*h*) Madd. & Geld. 205.

(*i*) To effectuate the service of process issuing from the Courts of Chancery and Exchequer in *England* and *Ireland* respectively.

(*k*) To amend and extend the preceding Act.

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Defendant who was out of the jurisdiction, to the person on whom it was proposed that the subpœna should be served, was a power authorising the donee to act for the Defendant in the management of his affairs, or, in other words, a general power. And Lord *Redesdale* relies upon that circumstance in his judgment. He says: "The Court has, indeed, substituted service in several cases where the party may have notice of the proceedings, and where, in case he goes out of the way, there is a person whom he has named in Court as his agent, and whom the Court can look on as such. But a person named agent *for a different purpose*, can not be looked on in that light." In the present case the power is not general but specific: the assignees in *Spain* have appointed *MacMahon* their agent or attorney for the purpose of claiming and recovering the wines, that is, the very same property, which the Plaintiffs, by their bill, claim to have a lien or charge upon, and which lien or charge they seek, by their bill, to enforce. In *Rickcord* v. *Nedriff*, the power of attorney which had been given, by the Defendant who had absconded, to the party whom it was proposed to substitute for him, was a power to receive the arrears and not the growing payments of the annuity.—[The *Vice-Chancellor*:—The application too was founded on an admission made by a third party, namely, by *Nedriff* in his answer.]—We have been furnished with extracts, from the Registrar's book, of the following cases: *Hallett* v. *Sutton* (*l*); *Carter* v. *De Bruyn* (*m*); *Hyde* v. *Foster* (*n*), and *Geledneki* v. *Charnock* (*o*); and we submit that those

(*l*) Reported in 1 Dick. 26, *nom. Hales* v. *Sutton.*

(*m*) Ibid. 39, *nom. Carter* v. *De Brune.*

(*n*) Ibid. 102, *nom. Hyde* v. *Forster & Myers*; S. C. 2 Mer. 459, note.

(*o*) 6 Ves. 171, *nom. Gildenichi* v. *Charnock.*

cases, together with *English* v. *Hendrick*, show plainly that the question as to the substitution of service, is a question not of jurisdiction but of discretion; and that the Court has jurisdiction to substitute the service in a proper case, in such a way as to satisfy the Court that it will reach the party*. The case of *Carrington* v.

* The following are the cases extracted from *Reg. Lib.* which are referred to above:—

(Lord Chancellor.)

12° January $17\frac{16}{17}$.

Inter MARIA HALLETT, Infans, et al. - Quer.
EDRED SUTTON, AR. GUL. COGAN, GUL. BROOKS, et Alios - - - - - - Deftes.

UPON opening of the matter this present day unto the Right honourable the *Lord High Chancellor* &c. by Mr. Serjeant *Jekyll*, Sir *Robert Raymond*, Mr. *Vernon* and Mr. *Williams*, being of the Plaintiff's councill, in the presence of Mr. *Ward* of councill for the Defendant *Brooks*, and of Mr. *Pancefort* of councill with *George Sayers*; it was alledged that *John Hallett*, late father of the Plaintiff *Mary Hallett* the infant, dying in *Barbadoes*, the Defendants *Edmund Sutton* and *William Cogan*, who live in *Barbadoes*, have sent over a probat, under the Governor's seal of the island, of a will pretended to be made by the said Colonel *John Hallett*, whereof they are executors, and, as such, claim the residue of the said Colonel *Hallett*'s personal estate after payment of his debts and legacies; and have likewise, with the said will, sent over a letter of attorney to the Defendant *Brooks* to procure a probate of the same will from the Prerogative Court of the Archbishop of *Canterbury*; and the Defendant *Brooks* hath, accordingly, employed Mr. *Sayers*, a proctor, to take out a commission, directed to the Governor of *Barbadoes*, in order to prove the said will *per testes*, the witnesses living in that island, which said Mr. *Sayers* hath summoned the Plaintiffs, who had entred a caveat against proving the said will, to show

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Cantillon (*p*) shows that the Court of Exchequer has the same jurisdiction.

their reasons against the proving thereof; and, upon hearing both sides, the said Prerogative Court hath directed such commission, which hath accordingly been sued forth. That the said Defendants, *Sutton* and *Cogan*, have already possessed the said Colonel *Hallett*'s estate in *Barbadoes*, and, if they be permitted to prove the said pretended will here, the Plaintiffs, who are the wife and daughter of the said Colonel *Hallett*, and who are advised to contest the validity of the said will, or at least the title to the personal estate not thereby disposed of, and who, for that purpose, have exhibited their bill in this Court, will not be able to compel them to account for the same, by reason process of contempt cannot be served in the said island: It was therefore prayed that service of process of subpœna, for the Defendants *Sutton* and *Cogan* to appear and answer the Plaintiffs' bill, on the said Defendant *Brooks* and on the said Mr. *Sayers*, may be deemed good service on the said Defendants *Sutton* and *Cogan*: Whereupon and upon hearing an affidavit of *Samuel Clark*, gentleman, read, and what was alleged on both sides, his Lordship doth order that service of process of subpœna, for the said Defendants *Sutton* and *Cogan* to appear and answer the Plaintiffs' bill, on the Defendant *Brooks* and on the said Mr. *Sayers*, the proctor who hath acted in the Prerogative Court in behalf of the said Defendants *Sutton* and *Cogan*, be deemed good service of such subpœna on the said Defendants *Sutton* and *Cogan*.—A. 1716, fol. 64, *E. G.*

(Lord Chancellor.)

Jovis, 12° July 1722.

Inter HEN. CARTER - - - - - - Quer.
DANIEL DE BRUYN, GERARD VANNECK, et al. - - - - - - - - - - Deftes.

UPON opening of the matter this present day unto the Right honourable the *Lord High Chancellor* &c. by Mr.

(*p*) Bunb. 107.

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7th July.

The VICE-CHANCELLOR:

In this case an order was made, directing that service, on Mr. *MacMahon*, of the subpœna to appear to and

Horsley, being of the Plaintiff's councill, in the presence of Mr. *Mead*, being of councill for the Defendant *Vanneck*, it was alledged that the Plaintiff exhibited his bill in this Court against the Defendants, to be relieved touching the matters therein contained; and the Defendant, *De Bruyn*, lives in *Holland*; so that the Plaintiff cannot serve him with a subpœna; and he employs the Defendant *Vanneck*, as his agent here in *England, to act for him in the matters in the said bill contained*: And, therefore, it was prayed that service of a subpœna to appear and answer the Plaintiff's bill, on the Defendant *Vanneck*, may be deemed a good service of the Defendant *De Bruyn*: Whereupon and upon hearing of the Defendant *Vanneck*'s councill and what was alledged on both sides, it is ordered that service of a subpœna on the Defendant *Vanneck*, for the Defendant *De Bruyn*, be deemed a good service of the said Defendant *De Bruyn* to compell him to appear to and answer the Plaintiff's bill.—A. 1721, fol. 295, *P.*

(Lord Chancellor.)

Monday the 5th day of August, in the 19th Year of the Reign of His Majesty King George the Second, 1745.

Between WILLIAM HYDE - - - Plaintiff.
WILLIAM FOSTER and JOHN MYERS and Others - - - - - - Defendants.

UPON opening of the matter this present day unto the Right honourable the *Lord High Chancellor* &c. by Mr. *Green*, being of counsel with the Plaintiff, it was alledged that, in Hilary term 1744, the Plaintiff exhibited his bill in this Court, against the Defendants, to be relieved touching the several matters therein complained of: That the Defendant *Foster* was, before the time of filing the bill, and is now at *Jamaica*, where he resides: That the Defendant *Myers* has put in his answer to the said bill, and thereby

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answer the Plaintiff's bill, should be good service on certain persons who were made Defendants to the bill, and set forth that he is factor or agent for the Defendant *Foster* here in *England*; and that, by virtue of some power or authority from the Defendant *Foster* (who is now at *Jamaica*) he has been for some time past and is now in the possession and receipt of the rents and profits of certain chambers in *Bernard's Inn*, for the use of the said Defendant *Foster*, which are part of the premises in question in this cause: And, therefore, it was prayed that service of a subpœna to appear in this cause, on the Defendant *Myers* as agent or factor for the Defendant *Foster*, may be deemed good service of the Defendant *Foster*: Whereupon and upon hearing of Mr. *Brown* and Mr. *Sewell* of counsel with the Defendant, the answer of the Defendant *Myers* read, and what was alledged by the counsel on both sides: His Lordship doth order that service of a subpœna to appear in this cause, on the said Defendant *Myers* as agent or factor for the Defendant *Foster*, be good service on the said Defendant *Foster*.—A. 1744, fol. 491.

(Lord Chancellor.)

Thursday, 2d July 1801.

Between ANTHONY GELEDNEKI and THOMAS MALLBY - - - - - - - Plaintiffs.

ROBERT CHARNOCK, WM. LENNOX, W. THOMPSON, and The Honourable The UNITED COMPANY of MERCHANTS trading to the EAST INDIES - - - - - - - Defendants.

UPON motion this day made unto this Court by Mr. *Stanley*, of counsel for the Plaintiffs, it was alledged that it appears by the affidavit of *John Warne*, clerk to Messrs. *Dann & Teasdale* solicitors for the Plaintiffs in this cause, that the Defendant *Robert Charnock* lives and resides in *Finsbury-square* in the city of *London*, and the Defendant *William Lennox* in *Broad-street Buildings* in the said city of *London*, and that the Plaintiffs having filed their

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were resident abroad. That order was made on an affidavit that the Plaintiffs had a lien on wines which had been consigned, to Messrs. *Courtney* in this country, by *Emilia Sheil*, of *Xeres* in *Spain*. After the consignment, Mrs. *Sheil* became bankrupt, and certain persons, residing at *Xeres*, named *De Giles* and *De Perea*, were appointed assignees of her estate by the Chamber of Commerce in that city. It was represented that *Mac Mahon* had received a power of attorney to act for the assignees, in this country, respecting the wines. In proof of this fact there was an affidavit alleging that the solicitor of the Defendants, or, rather, of Mr. *Mac Mahon*, represented that the power of attorney was of the most extensive kind, enabling *MacMahon* to prosecute and defend any suits, in this country, in relation to the rights of the assignees with regard to Mrs. *Sheil*'s property here, and in relation also to the claims of the Plaintiffs. That affidavit was, upon the application to discharge the order for substituting service, opposed by

bill against the said Defendant *William Thompson* who then and still resides out of the jurisdiction of this Court, as the said deponent believes, the said Defendant *William Thompson* appeared thereto by Mr. *Radcliffe* his clerk in Court, and made two several applications by motion to this Court, the notices whereof were signed by Messrs. *Crowder* & *Lavie* as his solicitors: And, therefore, it was prayed that process of subpœna to be awarded against the said Defendants *Robert Charnock*, *William Lennox* and *William Thompson*, to compel them to appear to and answer the Plaintiffs' bill, may be made returnable immediately, and that service of such subpœna on Messrs. *Crowder* & *Lavie*, the solicitors, and Mr. *Radcliffe*, the clerk in Court for the Defendant *William Thompson*, may be deemed good service on the said Defendant: which upon hearing the said affidavit read, is ordered accordingly.—A. 1800, fol. 426, *P. W.*

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a joint affidavit made by *MacMahon* and Mr. *Annesley*, his solicitor. I have read it, but I do not find that it denies the fact, that the power of attorney had been given to *MacMahon*. A further affidavit was then made by Mr. *Martineau*, the Plaintiffs' solicitor, and his clerk, which has not been contradicted. It stated that, since the service of the order of the 27th of May and of the subpœna on Mr. *MacMahon*, he, *MacMahon*, had written to Messrs. *Moore* & *Hanson*, of *Bristol*, a letter to this effect:—" Gentlemen," [*see ante*, p. 141]. The representation in this letter is a further confirmation of the first statement, that *MacMahon* has not only a power, from the assignees, to act for them generally, but also to act specially with regard to the wines in this country. The question then is whether the order for substituting service of the subpœna, is wrong?

The first case I shall advert to is that which has been cited from *Dickens*'s Reports, p. 26; and though, as Lord *Redesdale* said, in *Smith* v. *The Hibernian Mine Company*, *Dickens* was rather a loose Reporter, and his notes are not of very high authority, yet it happens that the facts, as stated in his report of the case, tally with the statement of them in the Registrar's book, although the case is reported under a somewhat different name. It is reported under the name of *Hales* v. *Sutton*; but the real name appears, from the Registrar's book, to be *Hallett* v. *Sutton*.

[His *Honor* here stated that case, and also *Carter* v. *De Bruyn*, and *Hyde* v. *Foster*, as extracted from Reg. Lib.]

Now it appears, from these cases, that three different Chancellors, namely, Lord *Cowper*, Lord *Macclesfield*,

and Lord *Hardwicke*, thought it right, in a case where it appeared that the person who was appointed agent, had special authority to act, for an absent defendant, in the matter which was the subject in dispute, that service of the subpœna on that agent should be good service on the principal abroad.

The case of *Geledneki* v. *Charnock* is reported in 6 Ves. page 171, but it is not quite correctly stated in the report.

[His *Honor* read the extract of that case from Reg. Lib.]

The Defendant therefore had appeared and had made two applications through his solicitors, Messrs. *Crowder & Lavie*; so that they were acting as the agents for the absent Defendant in the subject-matter of the cause; and Lord *Eldon* ordered substituted service of the subpœna upon them.

Then came the case of *English* v. *Hendrick*.

[His *Honor* stated the facts of the case and the judgment.]

Here we have five instances during the period from 1717 to 1821, in which four Lord Chancellors and one Vice-Chancellor have taken one uniform view of the practice.

In addition to these cases, there is a case in the Exchequer, *Carrington* v. *Cantillon*, which is reported in Bunbury, page 107.

It was said that all these authorities have been superseded, and that a different practice has been

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established in modern times; and the case of *Roberts* v. *Worsley* was cited in support of that statement. There, a defendant had appeared to and answered the original bill. The Plaintiff then amended his bill; at which time the Defendant was out of the jurisdiction of the Court. A motion was thereupon made that service of the subpœna to appear to and answer the amended bill, upon the Defendant's clerk in Court in the original suit, might be deemed good service upon the Defendant. Lord *Kenyon*, M. R., said he was clearly of opinion that such an order could not be made. And then some general language is put into His Lordship's mouth, which he might, perhaps, have used with reference to the facts of the case: but the language, as it stands in the report, is, I must say, directly contrary to the decided cases. It is this: "The Court will never appoint an attorney to act for a man without his leave, except in the case of an injunction bill; where it would be gross injustice that one man should be prosecuting an unrighteous demand at law, and yet put himself out of the reach of the *subpœna* of this Court, in a cause instituted for the purpose of restraining such proceedings. But the present application was quite different: an amended bill might be altogether a new suit; in which it would be very improper to force an attorney upon the party without his consent. And His *Honor* said, he remembered several applications of a similar nature, but they had never been attended with success." That case, I apprehend, was rightly decided; because the person who was the clerk in Court for the absent party, had no authority to act for him, in any capacity whatever, except as his clerk in Court; and he had that authority with respect to the original suit only. He could not, therefore, stand in the situation of a person specially

authorised to act, as the agent of the absent party, in the matter of the amended bill.

In *Bond* v. *The Duke of Newcastle*, which is much the same sort of case, a bill had been filed, by parties claiming under a marriage settlement, for a receiver of the amount of certain sums which had been allowed by the Commissioners of American Claims. *Bond* was the holder of the certificates which had been issued by the Commissioners on allowing those sums to be due; and he claimed to hold the certificates and to receive the monies payable on them, as a purchaser for valuable consideration without notice of the settlement. *Bond* filed his bill against the plaintiffs in the first suit, and then made an application that service on their clerk in Court might be deemed good service: which The *Lord Chancellor* thought could not be allowed. And it certainly could not: for the clerk in Court was agent only for the purposes of the suit in which Mrs. *St. George* and her trustees, who were the parties entitled under the settlement, were plaintiffs, and not in the suit in which they were made defendants. That too was not even a cross suit; for *Bond* was not a party to the other suit.

The next case is *Wellins* v. *Lomans*; in 2 Dick. 579. The case, as it stands in the book, is this: "A defendant, a mortgagor, living or being about to go abroad, by an indorsement on the mortgage deed, agreed, in case he should not redeem by a limited time therein mentioned, that two persons therein named should accept a subpœna for him to appear and answer any bill that should be filed against him touching the mortgage: the plaintiff having filed his bill to foreclose, applied that the persons named in the indorsement,

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might be served with the subpœna, and that such service might be deemed good service on the defendant. After standing over for consideration, His Lordship denied the motion." Then there is a note subjoined, which states that the two cases of *Hyde* v. *Foster* and *Carter* v. *De Bruyn*, which I have already observed upon, were mentioned. The note then adds: "But, in those cases, it was admitted or proved that the persons served, acted as attornies or agents for the defendants. ..... Besides, in this case, it doth not appear that it was with the privity of the persons named in the indorsement, that their names were used; neither did it appear that they would accept a subpœna to appear for the defendant; for who would indemnify them?" The case, therefore, seems to proceed on this, namely, that there was no sufficient evidence of the fact that the persons named in the indorsement were specially appointed attornies; and, therefore, it was quite right to deny that the service of subpœna on them, should be good service.

Then, in 1803, came the case of *Smith* v. *The Hibernian Mine Company*, which is reported in 1 Scho. & Lef. 238. There a defendant who was residing out of the jurisdiction, had given a power of attorney to a person to act for him in the management of his affairs; not in the management of the subject-matter of the suit: and the Court refused to allow substitution of service of subpœna on the person to whom the power was given. The Reporter makes Lord *Redesdale* say: "I think the Legislature has decided this question: it has, in several instances, substituted service; an interference which would be wholly unnecessary if this Court had power to do it. The Court has, indeed, substituted service in several cases where the party may have notice of the

proceedings, and where, in case he goes out of the way, there is a person whom he has named in Court as his agent, and whom the Court can look on as such. But a person named agent for a different purpose, can not be looked on in that light." Then his Lordship speaks of the case of an injunction bill; which every one admits. Next, he seems to refer to the case of *Wellins* v. *Lomans*, and adds: "That case was discussed with a considerable degree of attention; and I should imagine that those cases published by Mr. *Dickens* were cited: but Lord *Hardwicke* must himself have altered his opinion since the time when those cases were decided. Mr. *Dickens* was a very attentive and diligent Register; but his notes, being rather loose, were not considered as of very high authority: he was constantly applied to, to know if he had any thing on such and such subjects in his notes; but, if he had, the Register's books were always referred to." Lord *Redesdale* does not say on what occasion, or why he thought Lord *Hardwicke* had altered his opinion; but merely says he must have altered it. As far as we know, Lord *Hardwicke* had not altered his opinion, but remained of the same opinion at the time when he decided the case of *Hyde* v. *Foster* (*r*). Lord *Redesdale* then alludes to a case where a bill was filed to sell an estate for payment of debts, and the heir at law, who was entitled to the surplus after payment of debts, was out of the jurisdiction: and his Lordship says: "The Court ordered the estate to be sold for payment of debts: the heir might file a bill to set aside the proceedings if they were erroneous: and

(*r*) The cases cited, from *Dickens*'s Reports, in the argument of *Smith* v. *The Hibernian Mine Company*, were *Carter* v. *De Bruyn*, *Hallett* v. *Sutton*, and *Hyde* v. *Foster*. The first was decided by Lord *Cowper*, the second by Lord *Macclesfield*, and the last only by Lord *Hardwicke*.

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there the heir-at-law had a mother and sister living in *England*, and in the habit of corresponding with him; yet there was no conception of substituting service." There could, of course, be no such substitution, unless the persons so in correspondence with the heir, had a legal power to act, for him, in the particular subject to which the suit related. I think that the case of *Smith* v. *The Hibernian Mine Company* has no resemblance to the present; for, there, the foundation of the application was that the agent had a power to act for the absent party in the management of his affairs, that is, generally.

The next case was in the year 1817, *Rickcord* v. *Nedriff*, in 2 Mer. 458. There one defendant was out of the jurisdiction, and the other defendant admitted, by his answer, that he had received a power of attorney, from the absent defendant, to receive the arrears of an annuity which it was the object of the bill to set aside. The plaintiff, in that case, moved on the admission in the answer; and, of course, Lord *Eldon* refused the application: for there was no foundation for it; the admission in the answer of one defendant not being evidence against a co-defendant. Lord *Eldon* said that the proper course for obtaining the relief sought by the bill, would be by motion, against the defendant *Nedriff*, upon affidavit of the facts alleged as constituting the ground of the application. I can understand why the application was made in the manner it was; for, in *Hyde* v. *Foster*, the Court appears to have looked at the answer of a co-defendant. That, however, was a mistake. But, from what Lord *Eldon* said, I think it is clear that he thought the motion before him would have been proper, if the facts had been supported by affidavit.

Then it was said that the case of *Waterton* v. *Croft* was an authority that the order sought to be discharged, is wrong. There an original bill was filed, and then a cross bill; and an order was made, on a motion by the plaintiff in the cross suit, that the service of the subpœna to appear to and answer the bill in that suit on the clerk in Court of the plaintiff in the original suit, might be deemed good service; and I recollect expressing an opinion that that was not the proper course; but that the proper course was to move to stay the proceedings in the original suit, until the plaintiff had answered the bill in the cross suit. The only question in that case, was how far service on the clerk in Court ought to be considered good service. The distinction is plain between the case of a person being merely clerk in Court for a party, and the case of a person having an express authority to act for an absent party in the particular matter of the suit. And if I find the cases decided, uniformly, by four different Judges, on that principle, and none attacking it, it appears to me that the matter is concluded: for my opinion is that there is clear evidence, in this case, that *MacMahon* has special authority to act for the assignees of Mrs. *Sheil*. Therefore, the order for substituting service was right, and the application to discharge it is wrong, and must be refused with costs.

1841: 28th May.

Annuity. Heir and executor. Will. Construction.

A testator gave his real and personal estate to his wife, subject, amongst other bequests, to an annuity of 50 *l.* to *A. B. for ever*. Held that, on *A. B.*'s death intestate, the annuity passed not to his heir, but to his personal representative.

TAYLOR *v.* MARTINDALE.

JAMES HOWE made his will in the following words:

"I will, devise and bequeath, after all debts are paid, all the worldly property I die possessed of, whatsoever and wheresoever; one freehold estate, named *Heath Cottage*, at *Tonbridge Wells, Kent*; one freehold house, *Hendon, Middlesex*; and all freeholds, copyholds, leaseholds, monies in the funds, monies lent, stock in trade, and all other property of any or every kind, as I before observed, that I die possessed of, whatsoever and wheresoever, to my beloved wife, *Sophia Howe*, subject only to the hereafter written and following bequests: to my wife *Sophia Howe*'s dearly beloved sister, 50 *l.* a year for her life, and, at her death, to be equally divided between her son *George Cheeseman*, my dearly beloved wife *Sophia Howe* her own nephew, and *Augustus Howe*, my own nephew, son of my beloved brother, 25 *l.* a year to each for ever*: and, to my own dearly beloved brother, 50 *l. a year for ever*. I hope I am explicit. I will, devise and bequeath, to my dearly beloved wife *Sophia Howe*, all my freeholds, copyholds, leaseholds, monies in the funds, lent, stock in trade, book-debts and all other of whatever description I die possessed of, whatsoever and wheresoever, subject only to the above written bequests." And he appointed his wife his sole executrix.

* The testator seems to have described *G. Cheeseman* by his relationship to his wife's sister and also to his wife.

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William Howe, the testator's brother, survived the testator and died intestate. The question was, whether the annuity of 50 *l.* a year given to him for ever, passed, on his death, to his heir, or to his personal representative.

Mr. *Knight Bruce* and Mr. *Simpson* appeared for the Plaintiffs, who were not interested in the subject of the question.

Mr. *G. Richards*, for the heir of *W. Howe*, said that the annuity was charged on real as well as personal estate, and was given to *William Howe in perpetuum*, that is, to him and his heirs: and consequently it was an annuity in fee, and on the death of *William Howe* it descended to his heir. *Co. Litt.* 144 b. *Turner* v. *Turner* (*a*); *Earl of Stafford* v. *Buckley* (*b*); 1 *Williams on Executors*, p. 522.

Mr. *Loftus Wigram*, for the personal representative of *William Howe*:

There is no case in which the question has arisen, what is the effect of a gift of an annuity to a man for ever. The case of *Turner* v. *Turner* has no bearing on that question. The question in that case was whether the annuity was real or personal estate. It is quite clear that the annuity in this case is personal property.—[The *Vice-Chancellor*: The only question is whether it is descendible to the heir or not. Does not the law recognise an annuity as one species of hereditament?]—This annuity is not given to *W. Howe* and his heirs, but to him for ever; and it is nothing more than a gift, to him, of such a fund as would produce 50 *l.* a year for ever.

(*a*) Amb. 776, and 1 Bro. C. C. 316.
(*b*) 2 Ves. sen. 171.

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In the *Earl of Stafford* v. *Buckley*, the annuity was given to the daughter for life and to *her lawful heirs* for ever.

Mr. *Bichner*, Mr. *Warburton*, and Mr. *Tripp*, appeared for the other parties.

The VICE-CHANCELLOR:

This point is singular, and does not appear to have been decided by any of the cases.

There is no doubt that an annuity, though personal in its nature, may be granted to a man and his heirs. The description which Lord *Coke* gives of an annuity with its legal incidents, is: "An annuity is a yearly payment of a certain sum of money granted to another in fee, for life or years, charging the person of the grantor only. But not only the grantee but his heir and his and their grantee also, shall have a writ of annuity." Lord *Loughborough* too, in his judgment in *Turner* v. *Turner*, says that an annuity, when granted with words of inheritance, is descendible; but, as to its security, is personal only. In this case however the testator has not used words of inheritance; and it is not imperative on me to construe the words, "for ever," when used with reference to an annuity, to signify "heirs." In my opinion, the question is, which construction is most beneficial to the annuitant: and it seems to me to be most beneficial to him that the gift should be construed as a gift to him and his executors: as he might die without heirs; but might appoint executors. It is by no means a matter of necessity that a gift of an annuity to *A.* for ever, must be construed as a gift to him and his heirs for ever*.

* Sir *William Blackstone*, in his Commentaries, vol. 2, p. 40, says: "An annuity is a thing very distinct from a

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I think, therefore, I must hold that the gift in this case is a gift of the annuity to *William Howe* and his heirs, executors, administrators and assigns for ever.

rent-charge, with which it is frequently confounded; a rent-charge being a burthen imposed upon and issuing out of lands: whereas an annuity is a yearly sum, chargeable only upon the person of the grantor. Therefore, if a man, by deed, grant to another the sum of 20 *l per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity."

MOORE *v.* VINTEN.

1841: 31st May.

Trustee. Stat. 11 *Geo.* 4, *and* 1 *Will.* 4, *c.* 60. *Practice.*

A woman who was sole trustee for sale of real property, married a man who absconded and had not been heard of up to the hearing of the cause. The Court decreed a sale, and that

KNIGHT BRIDGE, by his will, after bequeathing a trifling legacy and directing payment of his debts out of his real estates in case his personalty should be deficient, and after appointing *Esther Gregson*, who was his wife's daughter, *John Lee* and *Richard Blizard*, executrix and executors of his will, gave, devised and bequeathed all the residue of his real and personal estate unto and to the use of the said *Esther Gregson*, *John Lee* and *Richard Blizard*, their heirs, executors, administrators and assigns, according to the nature of the property, upon trust to sell the same in such manner and at such time as they, or the survivors or survivor

the husband should be declared a trustee within the 11 Geo. 4 & 1 Will. 4, c. 60, s. 19; but declined to appoint a person to convey in his room, under the 8th section, on the ground that he was not the trustee: "last known to have been seised;" there being a joint seisin in him and his wife.

Proof of search for a trustee under the 24th section of the stat. 11 Geo. 4 & 1 Will. 4, c. 60, may be given, at the hearing of the cause, by affidavit.

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of them should think fit; and, after paying the expenses of the sale, upon trust to invest the produce in the funds, and pay the dividends to the testator's wife, *Esther Bridge*, for her life; and, after her decease, upon trust to stand possessed of the said funds and securities and the dividends thereof, in trust for the testator's three children, *Knight Bridge*, *Mary Moore* and *Elizabeth Beeson*, and for his wife's two children, *Elizabeth Mills* and the said *Esther Gregson*, in equal shares; and, in case any of the said legatees should die without issue in the lifetime of the tenant for life, his or her share to go to the others.

Knight Bridge, the testator's son, died without issue in the testator's lifetime.

The testator died in January 1836. His widow remained in possession of the real estate during her life, and died in August 1837.

In February 1836, *Esther Gregson* alone proved the testator's will. The other executors did not renounce probate, but they never interfered in the testator's affairs, and executed a deed of disclaimer of the trusts of the real estate.

In July 1836, *Esther Gregson* married *Thomas Vinten*, who, in December 1837, absconded, and had never been since heard of.

It appeared that part of the testator's real estate, which consisted of several houses and gardens, had been sold since Mrs. *Vinten's* marriage, and the money received by her husband; and he had absconded with it.

The object of the bill was to have the remainder of the property sold, and the produce secured for the parties entitled to it.

The Cause now came on for hearing; and, in support of the case made, by the bill, as to the absconding, continued absence and impossibility of finding the husband, the wife's answer and also an affidavit of search was read; and the only question was, what order could be made with reference to the execution of the trust for sale.

Mr. *Wakefield* and Mr. *Collyer*, for the Plaintiff:

The husband being a trustee within the 19th section of the 11 Geo. 4 & 1 Will. 4, c. 60, it is competent for the Court, under the 24th section, to receive proof, by affidavit, that the husband cannot be found: *De Crespigny* v. *Ketson* (*a*).—[The *Vice-Chancellor*: There is no doubt about that; I settled the practice in that case.]—Then, the husband being a trustee within the meaning of the Act, and it being unknown whether he be living or dead, the Court will appoint a person to convey in his room, under the 8th section; and will do so by the same decree which declares him to be a trustee (*b*). That a person who is merely a trustee by operation of law and who cannot be found, may be declared a trustee, under the Act, for the sole purpose of appointing a person to convey in his room under the 8th section, is apparent from *Beale* v. *Ridge* (*c*).

Mr. *G. Richards* and Mr. *Selwyn* appeared for Mrs *Vinten*, and offered no opposition.

(*a*) In Chan. Aug. 1839.
(*b*) See *Walton* v. *Merry*, *ante*, Vol. VI. p. 328.
(*c*) 4 Y. & C. 248, cited.

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The VICE-CHANCELLOR:

I doubt whether you can bring the husband within the 8th section of the Act. In order to do this, you must show that he is the trustee, "last known to have been seised:" but, here, there is a *joint* seisin in the husband and wife. You had better simply take a decree for sale, and let the husband be declared a trustee within the meaning of the Act. Perhaps you will hear of him again, before a conveyance is required; and then all further difficulty will be at an end.

END OF PART I. VOL. XII.

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

HEMINGWAY *v.* FERNANDES.

1841: 3d June.

Practice. New Orders. Plaintiff. Amended bill.

Although a Plaintiff has amended his bill under an order not expressing that he does not require a further answer, he may (if no answer is filed within the time allowed by the 10th Order of 1833, and he thinks proper to waive the further answer) file a replication under the 14th Order, although that Order applies, in terms, to those cases only in which the order to amend expresses that no further answer is required.

BY the 10th General Order of 1833, a defendant is allowed five weeks in a town cause and seven weeks in a country cause, to plead, answer or demur, not demurring alone, to an amended bill to which the Plaintiff requires an answer: and, under the 14th General Order, if a Plaintiff obtains an order to amend without requiring a further answer*, and amends accordingly, he is at liberty, after the expiration of eight days, to file a replication or set down the cause for hearing on bill and answer, unless the Defendant has previously served an order for time to answer, or taken out and served a warrant for time to answer the amended bill.

* If the Plaintiff does not require a further answer, the order to amend ought to contain a statement to that effect; otherwise it is irregular. *Boddington* v. *Woodley*, *ante*, Vol. IX. p. 380.

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In this case the Plaintiff amended his bill under an order which did not express that the Defendant was not required to answer the amendments; and afterwards served the Defendant with a subpœna to answer the amended bill. The Defendant, however, did not file his answer within the time prescribed by the 10th Order: whereupon the Plaintiff filed a replication.

Mr. *Knight Bruce* and Mr. *Loftus Wigram*, for the Defendant, now moved that the replication might be taken off the file, for irregularity, and that the Defendant might be at liberty to file his answer to the amended bill. They said that the Plaintiff was not at liberty to proceed in the manner pointed out by the 14th Order; as that Order applied to a case where the Plaintiff did not require a further answer; and not to a case like the present, where the order to amend did not express that the Plaintiff did not require a further answer; and that the Plaintiff, instead of filing a replication, ought to have proceeded to compel the Defendant to answer the amendments, by process of contempt.

Mr. *Bethell* and Mr. *Shadwell*, for the Plaintiff.

The VICE-CHANCELLOR:

As the Defendant neither put in his answer within the seven weeks, nor obtained an order for further time to answer at the expiration of that period, I think that the Plaintiff was at liberty to take the course which he has adopted: but, as this appears to be a new case, I shall allow the Defendant a fortnight to put in his answer: he must, however, pay the costs of the application.

[Reg. Lib. A. 1840, fo. 895.

TOMLIN *v.* HATFEILD.

1841: 4th June.

Will. Construction. Distribution.

EDWARD TADDY, the testator in the cause, by his will, dated the 24th of April 1835, disposed of his residuary real and personal estate in the following words:

"And as for all other my messuages, lands, tenements and hereditaments, and parts and shares of messuages, lands, tenements and hereditaments, and real estate whatsoever and wheresoever, and whereof no entire or absolute disposition is hereinbefore contained; and also as for all my monies, securities for money, effects, goods, chattels and personal estate whatsoever (after and subject to the payment out of such my personal estate, of all my just debts, and funeral and testamentary charges and expenses, and the several legacies hereinbefore by me given and bequeathed), I give, devise and bequeath the same and every part thereof, unto and to the use of my nephews, *John Tomlin*, *James Tomlin*, *Edward Hatfeild* and *Charles Hatfeild*, my executors hereinafter named, their heirs, executors, administrators and assigns, upon trust that they, or the survivors or survivor of them, or the heirs, executors, administrators or assigns respectively of such survivor, shall and do, when and as they or he shall, in their or his discretion, think fit, absolutely sell and dispose of all my said real estates hereby devised to them, and shall and do, forthwith upon my decease, collect, get in and convert into money

Testator directed his residuary real and personal estate to be divided, by his trustees, in such shares and at such times as they should think proper, amongst his nephews, *A.*, *B.*, and *C.*, and his other nephews and nieces, sons and daughters of his late sisters *T.* and *H.*, who should be living at his decease, and the children of any other such nephews and nieces who, having died in his lifetime, had left issue. There were several children, and children of deceased children, both of *T.* and of *H.*, living at the testator's death. The trustees not being able to agree as to the division of the property, the Court ordered it to be divided amongst the children, and the deceased children of *T.* and *H.*, *per capita*.

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all such parts of my residuary personal estate, hereby bequeathed to them, as shall not, at my decease, consist of money; and my will is that, until my said real estate shall be sold and disposed of as aforesaid, the rents and profits thereof shall be considered as part of my residuary personal estate, and go as I have hereinafter bequeathed such residue: and, as for all the monies to be received, as well from the sale of my real estates hereinbefore directed to be sold and disposed of as aforesaid, as from the rents and profits in the meantime to be received in respect thereof; and also, as for all the monies to be received from my residuary personal estate, my will is that my said trustees and executors, and the survivors and survivor of them, and the executors or administrators of such survivor, shall pay and divide the same to and amongst themselves the said *John Tomlin*, *James Tomlin*, *Edward Hatfeild*, *Charles Hatfeild*, and my other nephews and nieces, sons and daughters of my late sister, *Susanna Tomlin* deceased, and of my sister *Ann Hatfeild*, who shall be living at my decease, and the children of any other of such nephews and nieces, who, having died in my lifetime, have left issue, in such parts, shares and proportions, manner and form, in all respects, and at such time or times, as they, my said trustees and executors, or the survivors or survivor of them, or the executors or administrators of such survivor, shall judge proper and direct; my will and meaning being that the division and distribution of all the said monies shall rest wholly with them my said trustees and executors, and be in their entire discretion, and that their disposal and appropriation thereof shall not be called in question or disputed by any person or persons whomsoever: and, further, I do hereby declare and expressly direct that; in case any of my said nephews or nieces or any child or children

of any deceased nephew or niece, shall be dissatisfied with the proposed division and distribution of the last-mentioned trust monies by my said trustees, and shall attempt, by any means, to interfere with or control them therein, such nephew or niece or child or children of any deceased nephew or niece, shall be wholly and absolutely debarred and for ever excluded from any benefit of or from or participation in the trust monies or funds last above mentioned and so ordered to be divided or distributed by them the said *John Tomlin*, *James Tomlin*, *Edward Hatfeild* and *Charles Hatfeild* as hereinbefore mentioned."

It appeared, from the report made in pursuance of the decree at the hearing, that there were eight children, and two grandchildren the issue of two deceased children, of the testator's sister *Susanna Tomlin* living at the testator's decease: and that there were seven children, and seven grandchildren the issue of a deceased child, of the testator's sister *Ann Hatfeild*, living at the same time.

The bill was filed by *John* and *James Tomlin* and *Charles Hatfeild*, against *Edward Hatfeild* and other persons interested under the will, alleging (amongst other things) that the Plaintiffs were desirous to carry into effect the trusts reposed in them, by the will, jointly with *Edward Hatfeild*, by selling the estates devised to them, and distributing the proceeds thereof and the residue of the testator's personal estate and effects amongst themselves and *Edward Hatfeild* and the other nephews and nieces of the testator, sons and daughters of his sisters *Susanna Tomlin* and *Ann Hatfeild*, and the children of such other nephews and nieces, children of *Susanna Tomlin* and *Ann Hatfeild*, who died in the

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testator's lifetime leaving issue, according to the will: but *Edward Hatfeild* refused to concur, with the Plaintiffs, in effecting such sale and distribution. The bill prayed that the will might be established and the trusts of it performed under the decree of the Court; and that the rights and interests of all parties in the testator's residuary real and personal estates, might be declared and ascertained; and that the real estates devised to the Plaintiffs and *Edward Hatfeild*, might be sold; and that the proceeds thereof and of the testator's residuary personal estate might be distributed amongst the Plaintiffs and *Edward Hatfeild* and the other parties entitled thereto under the will, according to the intention of the will.

The cause now came on to be heard for further directions.

The question was whether the proceeds of the sale of the testator's residuary real estates and his residuary personal estate were to be divided, *per stirpes* or *per capita*, amongst the children, and the children of deceased children of *Susanna Tomlin* and *Ann Hatfeild* mentioned in the *Master*'s report.

Mr. *Knight Bruce*, Mr. *Wigram*, Mr. *Loftus Wigram* and Mr. *Rogers*, for the Plaintiffs and for the Defendants in the same interest, contended that the division ought to be made *per stirpes*, as being the most equitable and the most conformable to the testator's presumed intention.

Mr. *Girdlestone*, for the Defendants, the seven grandchildren of *Ann Hatfeild*, said that, as the trustees could not agree as to the mode of division, the Court

must divide the property amongst the claimants equally, that is, *per capita.*

The VICE-CHANCELLOR:

The will directs the trust property to be divided amongst certain individuals, some of whom are named and some of whom are not named, but described: and I see nothing which shows that they are to take otherwise than as they are named and described. Therefore, all those persons who come within the description of children of deceased nephews and nieces of the testator, must take, individually, a share.

"The trustees and executors of the will not being able to agree as to the mode of dividing the residuary real and personal estates of the testator, amongst the persons amongst whom the same were, by the will of the said testator, directed to be divided, declare that the several persons in the *Master*'s report mentioned in that behalf, that is (the children and the children of the deceased children of *Susanna Tomlin* and *Ann Hatfeild*), are entitled to the residuary real and personal estates of the said testator in equal shares and proportions."

1841 : 4th June.

Will. Construction. Intermediate rents.

Testator devised his real estates to trustees, in trust to sell as soon as conveniently might be after his decease, and as to the proceeds, together with the intermediate rents, after payment of the testator's funeral and testamentary expenses, debts and legacies, to pay one moiety to his nephew, and to invest the other moiety in the funds, in trust for his nephew, for life, and, after his death, for his children. The real estates were not sold until some years after the testator's death. Held that rents accrued in the meantime, ought not to be invested for the benefit of the nephew and his children, but that the nephew was entitled to them.

VIGOR *v.* HARWOOD.

EDWARD LANE, by his will dated the 23d of October 1813, appointed the Defendants, *Harwood* and *Apletree*, executors thereof and trustees of his real and personal estate for the purposes after mentioned. He then gave various pecuniary legacies, and subjected all his real and personal estate, except the life-interest in his dwelling-house thereinafter given to his sister, *Mary Lane* (since deceased), with the payment thereof. He next gave, to his sister *Mary Lane*, the use and enjoyment, during her life, of all his household goods and furniture and implements of household, books, plate, linen and china; and willed that, after her death, the same should fall into the residue of his personal estate for the purposes after mentioned: and he devised to his said sister his dwelling-house at *Basingstoke*, during her life. The will then proceeded as follows: "And, lastly, as to, for and concerning all and singular my personal estate, of whatsoever nature, kind or description, subject to the said bequest of the use of the said household goods and furniture and implements of household, books, plate, linen and china to my sister for her life; and as to, for and concerning all and every my freehold, leasehold and copyhold manors, messuages, lands, tithes, hereditaments and premises situate, lying and being in the counties of *Southampton* and *Buckingham* and in the city of *Oxford* or elsewhere (which copyholds I have duly surrendered to the use of my will), subject nevertheless to the devise of my said dwelling-house,

with the appurtenances to my said sister for her life, I give, devise and bequeath the same and every part thereof unto the said *John Harwood* and *William Apletree* and to the survivor of them, his heirs, executors and administrators, according to the respective qualities of my said real and personal estate, upon trust, nevertheless, as soon as conveniently may be after my decease, either publicly or privately and for the most money that can be had or gotten for the same, to sell and dispose of all and singular my said manors, messuages, lands, tenements, tithes, hereditaments and premises, either together or in parcels, as they, my said trustees, or the survivor of them, or the heirs, executors, or administrators of such survivor shall think proper and most for the benefit of the person and persons to be interested in the produce thereof by and under the trusts of this my will; and in trust, as to the net produce of all such sale and sales, *together with the intermediate rents* and the surplusage, if any, of my general personal estate, after payment and discharge of my funeral and testamentary expenses and all other my just and lawful debts, and subject to the legacies herein and in the schedule hereto mentioned and contained, to pay one moiety or half part thereof unto my nephew, *William Vigor*, to and for his own sole use and benefit, as a vested and transmissible interest; and upon further trust to place out and invest the other moiety or half part thereof, in the names of my said trustees or of any new or other trustees to be appointed under the powers of this my will, on Government or real security, during the term of the natural life of my said nephew, and to apply and pay the interest, dividends and produce thereof, half-yearly or otherwise as the same shall become due and payable, unto my said nephew for his own sole use and benefit; and, upon and after the decease of my said nephew, to

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call in the said trust monies so directed to be invested at interest as aforesaid, and apply, pay and divide the same to and amongst all and every the children of my said nephew lawfully to be begotten, if more than one, equally, share and share alike, and, if there shall be only one such child, then the whole to such child; and, in default of and for want of such children or child of my said nephew *William Vigor*, or, being such, all of them should die in his lifetime without leaving lawful issue then living, in trust to continue the same at interest during the life of the widow of the said *William Vigor*, in case he shall leave a widow him surviving, for and during the term of her natural life; and, from and after her decease, or in case then there shall be no such children or child of the said *William Vigor* him surviving, or, being such, all of them shall be then dead without leaving lawful issue, in trust to pay, apply and divide, the said principal trust monies, unto and amongst such person and persons as shall then be the next of kin of me the said *Edward Lane*, nevertheless to the utter exclusion of my wife, *Catherine Lane*, now and for many years past living apart from me, and any children she has or may have. Provided always that, if any or either of the children of my said nephew, *William Vigor*, shall happen to die in his lifetime leaving lawful issue, the share and shares of such children or child so dying, shall go to and amongst such issue equally, to take *per stirpes*, and not *per capita*; and, in default of such issue, to and amongst the survivors of the said children of my said nephew, *William Vigor*, if more than one, but if there shall be only one such surviving child, then the whole to such survivor." And the testator directed that the survivor of his said trustees should, as soon as conveniently might be after the decease of his co-trustee, proceed to the nomination and appointment of some

new trustee, and so on from time to time while the trusts of his will should remain unaccomplished; and empowered his trustees, from time to time, to lease, manage and conduct the business of his said estates in the best possible way according to their judgment and discretion until they should be sold as aforesaid.

The testator died in February 1826. The trustees and executors entered into the possession or receipt of the rents of the testator's real and leasehold estates; and possessed themselves of his personal estate, which was insufficient to pay his funeral and testamentary expenses, debts and legacies; and they afterwards sold the whole of the real estates except the estates in *Buckinghamshire*, of which they were still in possession: and, out of the monies produced by those sales and arisen from the testator's personal estate, they paid the testator's funeral and testamentary expenses and debts; and they invested the residue in Government or real securities.

The bill was filed by *William Vigor*, the testator's nephew (and who had become his heir and sole next of kin), against the trustees and executors of the will and the Plaintiff's two children, one of whom was an infant; and, after stating as above, it alleged that the trustees were about to sell the estates in *Buckinghamshire* and to wind up the testator's affairs: but that doubts had arisen touching the application of the income of the testator's real and personal estate from the time of his death: that it was contended, by or on the part of the Defendants, the children of the Plaintiff, that a moiety of the income of the real and personal estates from the time of the testator's death until the sale and investment and payment of his real and personal estates according

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to the trusts of his will (subject to any proper application of the income, if necessary, towards the payment of his funeral and testamentary expenses, debts and legacies), ought to be invested, pursuant to the trusts of the will, in Government or real security, for the benefit of the Plaintiff and his children. But the bill charged and prayed the Court to declare that, according to the true construction of the will, the Plaintiff (subject, if necessary, to the testator's funeral and testamentary expenses, debts and legacies) was entitled, for his absolute use and benefit, to the whole of the rents and profits of the freehold, copyhold and leasehold estates, from the testator's death until the sale of those estates; and that, subject as aforesaid, the Plaintiff was also entitled to the income, from the death of the testator, arising on all such parts of the testator's personal estate as, at the time of his death, produced income, and also to the income arising from other parts of the personal estate as had been realised and invested by the trustees, from the respective times of such investments, and that the amount of such rents and profits and income might be ascertained and paid to the Plaintiff.

Mr. *Knight Bruce* and Mr. *Hislop Clarke*, for the Plaintiff, contended that no part of the income arisen from the real and personal estates from the testator's death, ought to be invested, on securities, for the benefit of the Plaintiff and his children; but that the whole of it ought to be paid to the Plaintiff. They relied on *Noel* v. *Lord Henley* (*a*), and *Sitwell* v. *Bernard* (*b*).

Mr. *G. Richards* and Mr. *Freeling*, for the Plaintiff' children, said that the will contained an express dire

(*a*) 7 Price, 241. (*b*) 6 Ves. 520.

tion that the real and personal estates should be sold as soon as conveniently might be after the testator's death; and that, after payment of his debts &c., one moiety of the net produce, and also of the intermediate rents, should be invested, by the trustees, in the usual securities, for the benefit of the Plaintiff for his life, and after his death, for the benefit of his children: so that the income of the testator's property was incorporated with and subjected to the same trusts as the capital; and the Court could not hold that the Plaintiff was entitled to the intermediate rents, without violating the plain language of the will.

Mr. *Allfrey* for the executors and trustees of the will.

The VICE-CHANCELLOR:

Taking the words of the will, which Mr. *Richards* has relied on, by themselves, it might be contended that they would amount to a direction to accumulate the intermediate rents: but the cases which have been cited by the Plaintiff's counsel, warran me in saying that a much more clear trust for accumulation would be required, in order to take away the enjoyment of the estates from the tenant for life.

"Declare that, according to the true construction of the will, the Plaintiff is entitled for his life, subject to the payment of the testator's funeral and testamentary expenses, debts and legacies, to the income of the real and personal estates, from the testator's death, until the sale and conversion thereof directed by the will."

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7th June.

Will.
Construction.
Devise.
Trust-estate.

Testator gave all his property whatsoever and wheresoever the same might be at his decease, to his wife, for her absolute use for ever,
Held that an estate vested in the testator as a trustee, passed by the devise.

LINDSELL *v.* THACKER.

JOHN THACKER and *Catharine* his wife being seised of a copyhold estate for their lives and the life of the survivor of them, with remainder to the heirs of the survivor, and *Thacker* having agreed to sell the estate to *John Lindsell*, he and his wife surrendered it to *Lindsell* and *Margaret* his wife for their lives and the life of the survivor of them, with remainder to *Margaret* and her heirs: and *Thacker* executed a bond, to *Lindsell*, conditioned for the further surrendering and assuring of the estate, by him and his wife and all persons claiming under them, to *Lindsell* and wife. Afterwards *Lindsell* died leaving his wife (who was the Plaintiff in the cause) surviving. Then, Mrs. *Thacker* died; and, after her death, her husband married again. In 1823 the husband died, having in January of that year, made his will in the following words: "I hereby give and bequeath all my property whatsoever and wheresoever the same may be at the time of my decease, unto my loving wife, *for her sole use* for ever: and I also further appoint my affectionate and loving wife, *Ann Thacker*, whole and sole executrix of this my last will: and I further declare and appoint *H. Markland* and *E. P. Sharpe* executors in trust of this my last will."

The surrender by *Thacker* and his first wife not having, as it was alleged, affected the remainder which was then contingent but afterwards vested in *Thacker* on the death of his first wife, the bill prayed that the Defendant, his widow, might procure herself to be admitted to the estate and then surrender it to the Plaintiff, Mrs. *Lindsell*, in fee.

The question, which was discussed on the argument of a demurrer, was whether the legal interest in the estate which was vested in *Thacker* at the date of his will and at his death, passed, under the general devise in his will, to the Defendant.

Mr. *James Russell* and Mr. *Romilly*, in support of the demurrer:

Whatever is given by Mr. *Thacker*'s will, is given to his wife for her separate use. *Adamson* v. *Armitage* (*a*); *Ex parte Ray* (*b*). Those cases establish that a gift to the *sole* use of a woman, is equivalent to a gift to her *separate* use: and that being so, a mere dry, legal estate would not pass by the general words in the will; for a dry, legal estate could not be taken, by the testator's widow, for her separate use. Besides, the language of the will, throughout, is much more applicable to personal than to real estate. In *Ex parte Brettell* (*c*), a testator devised all the rest, residue and remainder of his estate and effects whatsoever and wheresoever and of what nature or kind soever, to his natural son, *George Hall*, his heirs, executors, administrators and assigns for ever, to and for his and their own proper use and benefit: and Lord *Eldon* said that, although the testator, probably, meant nothing by the words: "to and for his and their own proper use and benefit," yet a meaning must be attributed to every word; and that there was not enough, in the will, to make the natural son a trustee. It is observable that, in that case, there were no words which qualified the interest given to the natural son: but, in this case, whatever passed to the wife, was to be enjoyed by her, for her separate use; and

(*a*) 19 Ves. 416. (*b*) 1 Madd. 199.

(*c*) 6 Ves. 577.

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that was a qualification which could not be annexed to an estate of which she was to be a mere trustee. Consequently the legal interest in the copyhold estate did not pass by the will. In *Lord Braybroke* v. *Inskip* (*d*), Lord *Eldon* said, in effect, that trust estates would not pass under general words, if it could be collected (as it can be here), from expressions in the will or the purposes or objects of the testator, that he did not mean they should pass. In *Ex parte Shaw* (*e*), a testator gave all the property he might die possessed of or might thereafter acquire, to his wife, her heirs, executors, administrators and assigns, to and for her own absolute use and benefit, and to be disposed of, by her, by deed, will or otherwise as she might think fit; and it was held that an estate of which the testator was a trustee, passed by the devise. There, the words superadded to the gift, were not at all inconsistent with a legal estate passing: but, here, the qualified interest given to the wife, is quite inconsistent with a legal estate passing by the devise. *Ex parte Marshall* (*f*).

Besides, in this case, the question relates, not to a freehold, but to a copyhold estate; and it is by no means clear that the general words will pass a copyhold estate which has not been surrendered to the use of the will. In *White* v. *Vitty* (*g*), the Lord C. J. says: "It is stated, as a fact, that these copyholds were surrendered to the use of the testator's will. If they had not been surrendered, it would have been difficult probably whatever might have been the intent of the testator, t have said that the words of the residuary clause, we sufficient to pass them."—[The *Vice-Chancellor*: T

(*d*) 8 Ves. 417; *see* 435.
(*e*) *Ante*, Vol. VIII. p. 159.
(*f*) *Ante*, Vol. IX. p. !
(*g*) 2 Russ. 484; *see*

will in this case, was made after the necessity of surrendering copyholds to the use of a will, had been dispensed with.]—It may be fairly concluded that the testator, in this case, thought that he had disposed of all his interest in the estate, by the surrender which he had made to Mr. and Mrs. *Lindsell*: but, if he was aware that any interest remained in him, then, by not surrendering the estate to the use of his will, he showed that he did not intend that it should pass by his will.

Mr. *Knight Bruce* and Mr. *Willcock*, in support of the bill:

The presumption is that a legal estate passes by general words in a will; and it lies on those who say that it does not pass, to show that there is something in the will, which clearly shows that the testator must have intended that it should not pass. In *Lord Braybroke* v. *Inskip* (*h*) Lord *Eldon* says: "I know no case which states, as the rule, that trust estates shall not pass under general words, unless an intention that they should pass, appears; and I incline to think they will pass, unless I can collect, from expressions in the will or purposes or objects of the testator, that he did not mean they should pass. In this case, there is no circumstance, except one that I shall observe upon, denoting any special intention. It is the case of a dry trust; all the debts and legacies being long paid, as I now understand. There was, therefore, a pure, legal estate in this testator; nothing remaining to be done but to reconvey. There is no one circumstance, in this will, to cut down the general effect upon any notion of intention; unless it can be said that, where he meant to create a trust, viz. as to the personal

(*h*) 8 Ves. 435.

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estate, he joins another person with his wife; giving the real estate to her alone. But that is too thin an evidence of intention to afford much inference. The result is this: a will containing words large enough, and no expression in it authorizing a narrower construction than the general legal construction, nor any such disposition of the estate as is unlikely for a testator to make of any property not in the strictest sense his (as complicated limitations) nor any purpose at all inconsistent with as probable an intention to vest it in his wife, as devisee, as to let it descend. I know of no case, in which a mere devise in these general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose or objects or the person of the devisee, has been held not to pass the trust estate." In order to cut down the effect of a general devise, it is not sufficient to show that the testator intended a benefit by it: for every devise imports a benefit: and, in *Ex parte Shaw*, express words to that effect were added to the devise; and yet your *Honor* held that a dry, legal estate passed by the devise. *Ex parte Whitacre, in re Vallis* (*i*). Here the testator meant to put his wife in his own situation with respect to all his property, and to give her the means of performing the obligation which he had created, by executing the bond to Mr. *Lindsell*.

The VICE-CHANCELLOR:

I am of opinion that the demurrer ought to b allowed. For I take the rule to be as laid down i *Lord Braybroke* v. *Inskip*, namely, that a trust esta will pass by general words in a will, unless it can collected, either from the expressions in the will from the purposes or objects of the testator, that he

(*i*) 1 Sanders on Uses and Trusts, 285, note.

not mean that the legal estate should pass: as, for instance, where the devise is of all the testator's real estates, to a trustee in trust to sell and receive the proceeds, or where the estates are given to one for life with remainders over. There the object of the devise in the one case and the mode of limitation in the other, are inconsistent with the intention to pass a dry, legal estate.

If the testator in this case, had simply given all his property to his wife and her heirs for ever, or if he had given it to her in any other general words amounting only to the same thing, the legal estate would have passed, according to what Lord *Eldon* says, in his judgment in *Lord Braybroke* v. *Inskip*, where he speaks of his decision in *Ex parte Brettell*. His Lordship says: "I certainly did not mean to be understood to put anything (as I am now understood, at the bar, to have done) upon the expression that it was given to the use and behoof of the party. I perfectly agree that giving to a man, his heirs and assigns, is perfectly the same. But I meant that I thought I could collect that the testator intended to give, to that individual, a property which he could enjoy as beneficially as that property that was his own. I desire, therefore, not to be understood to put that opinion upon any such words, except so far as I could collect the intention from the will, calling in aid the particular situation of the devisee. My meaning was only that it may be a circumstance upon the intention, that the testator did not mean a mere, dry, trust estate, and not in a beneficial sense altogether his, should pass as his under general words; when, if it did, it was incapable of such a large species of enjoyment as, upon the whole will, he intended to give in every part of the property." But, in this case, the tes-

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tator has given all his property whatsoever and wheresoever to his wife, in a particular manner, that is to say for her sole use. The words, "sole use," necessarily imply separate use, and indicate that the testator meant that the property which he had devised to his wife should be enjoyed by her beneficially. Then, if I find that the intention of the testator was that the subject of the devise should be beneficially enjoyed by the devisee, I am bound, by the decision in *Lord Braybroke* v. *Inskip*, to say that, in this case, there is a sufficient demonstration of intention that a mere, dry, legal estate should not pass by the devise.

[Demurrer allowed.

PAINE *v.* WAGNER.

1841: 8th and 9th June.

Will. Construction.

A will contained the following clause: "I recommend that the house and premises may be disposed of as soon as possible, and, after paying all just debts, may be equally divided, share and share alike, Mrs. *M.*, Mr. and Mrs. *W.* and children, likewise *H. H.*" Held that Mrs. *W.* was entitled to an equal share of the proceeds of the house and premises, as tenant in common with her husband and her children living at the testator's death, and with Mrs. *M.*, and *H. H.*

ALEXANDER MITCHELL made his will, dated the 28th of November 1819, in the following words: "Memorandum, in case of death, I leave, to my dear wife, 150*l.* per annum, for her life, to have a power of receiving it herself from the interest of money in the 5 per cents.; at her death, the principal to be equally divided amongst *Anthony* and *Sarah Wagner*'s children, giving to *Hannah Harby* an equal share with the children. I likewise leave, to my dear wife, a mortgage of 300*l.* at *Stathorne*; the same 300*l.* to be at her own disposal. I leave to *Hannnah Harby* 700*l.*, to be paid to her in full, likewise the legacy left by my late brother. I leave to my sister, *Margaret Gregory*, the interest of

200*l.* in the 5*l.* per cents.; at her death, the 200*l.* to be equally divided amongst her children. I leave my brother *George* ten guineas. I leave to *Robert*'s widow, ten guineas. I leave to *Anthony Mitchell Wagner* the lease of Mr. *Monk*'s house. I recommend that the house and premises may be disposed of as soon as possible; and, after paying all just debts, may be equally divided, share and share alike, Mrs. *Mitchell*, Mr. and Mrs. *Wagner and children*, likewise *Hannah Harby*. I leave to *W. A. Gould*, ten guineas. I appoint Mrs. *Mitchell* and *Anthony Wagner* in trust for the whole concern."

The testator died on the 6th of June 1821. His estate consisted, in part, of two leasehold houses, one, situate in *Queen-street, Pimlico*, in *Middlesex*, which was let to Mr. *Monk*, and the other, situate in *Ranelagh-walk* at the corner of *Queen-street*, in which the testator resided at his death, and which was alleged to be the property mentioned, in his will, as: "The House and Premises."

The bill was filed by the testator's widow (who married after the testator's death) against *Anthony Wagner* and his children living at the testator's death, and certain other persons, praying that the trusts of the will might be performed and that the clear residue of the testator's estate and effects might be ascertained, and the rights, shares, and interests of all parties interested therein ascertained, and paid, applied or secured for their benefit.

Two of the Defendants demurred to the bill because the personal representative, *Sarah*, the wife of *Anthony Wagner*, (who died several years after the testator,) was not a

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party to the suit. The demurrer was in the following form: "These Defendants, by protestation &c., do demur to the said bill, and to all the relief and all the discovery thereby prayed; and, for cause of demurrer, show that the said Plaintiff hath not made the personal representative of *Sarah Wagner* in the said bill named, the late wife of *Anthony Wagner*, one of the Defendants to the said bill, a party to the said bill, nor prayed process against such personal representative; and that such personal representative is a necessary party to the said bill. Wherefore, &c."

Mr. *Knight Bruce* and Mr. *Charles Hall*, in support of the demurrer:

The will directs the house and premises, or their produce, to be equally divided, share and share alike, between the Plaintiff, Mr. and Mrs. *Wagner* and their children, and *Hannah Harby*. If a legacy is given to a man and his wife, equally to be divided between them, each of them takes a moiety of the sum bequeathed. Mrs. *Wagner* was as distinct an object of the bequest in question, as the Plaintiff. Consequently, she became entitled to share in the subject of the bequest, equally with the other objects. Therefore her personal representative is a necessary party to the suit.

Mr. *Girdlestone* and Mr. *Cameron*, in support of the bill:

First: the demurrer is wrong in point of form; for it alleges, merely, that Mrs. *Wagner*'s personal representative is a necessary party to the bill: but that is not sufficient. The demurrer ought to have alleged that *it appeared, by the bill*, that her personal representative was a necessary party.

Secondly: there is no fair construction of the will, under which Mrs. *Wagner* can be held to take such an interest in the property in question, as will make her personal representative a necessary party to the suit. The only construction which could make her personal representative a necessary party, is that she and her husband and children were tenants in common; but we submit that that construction is entirely excluded: for the words, 'share and share alike,' were not intended to be read distributively; but Mr. and Mrs. *Wagner* and their children were meant to take as joint-tenants, as amongst themselves. In the bequest of the capital of the stock out of which the annuity of 150*l.* was to be paid, the testator speaks of the children as a class; and, in the bequest in question, he speaks of them and their parents, as a class: that is, he names three classes as the objects of the bequest: his widow is one, Mr. and Mrs. *Wagner* and their children are another, and *Hannah Harby* is the third. *Bricker* v. *Whatley* (*a*); *Buffar* v. *Bradford* (*b*); *The Attorney-general* v. *Bacchus* (*c*).

There is also another construction which the words of the bequest will bear, and which makes it unnecessary for Mrs. *Wagner*'s personal representative to be brought before the Court; namely, that Mr. and Mrs. *Wagner* took for their lives with remainder to their children. *Newman* v. *Nightingale* (*d*), *Crawford* v. *Trotter* (*e*), are authorities for that construction.

The VICE-CHANCELLOR:

In my opinion this is a good demurrer.

(*a*) 1 Vern. 233.
(*b*) 2 Atk. 220.
(*c*) 9 Price, 30.
(*d*) 1 Cox, 341.
(*e*) 4 Madd. 361.

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I do not feel any difficulty upon the point of form; for I think the demurrer is sufficiently good in that respect.

Next as to the substance of the case. In the first instance, the testator has given the fund which was to produce the annuity, to be equally divided between *Anthony* and *Sarah Wagner*'s children, giving to *Hannah Harby* an equal share with the children. There the children are stated to be substantive takers. Then, when he comes to speak about the money which was to arise from what he calls the house and premises, after paying his debts, he says: "I recommend the house and premises may be disposed of as soon as possible, and, after paying all just debts, may be equally divided, share and share alike," leaving out the word, 'between' "Mrs. *Mitchell*, Mr. and Mrs. *Wagner* and children, likewise *Hannah Harby*." It is a very ill-arranged set of words I admit; but it appears to me that the natural construction of them, is that all the parties who are either named or described, are to take, as between themselves, as tenants in common.

The demurrer therefore must be allowed.

I have certainly understood the law, ever since *Wild*'s (*f*) case, to be this, namely, that, if there is a gift, simply, to parents and children, and there be children living at the time, the children take with their parents: if there be no children, then the parents take for their lives, with remainder to their children.

(*f*) 6 Rep. 16 b.

JONES *v.* ROBERTS.

1841: 9th June.

Practice. Motion.

A person, though not a party to a suit, may apply in it by motion (stating his title in the notice of motion), unless a long statement of facts is required to show his title; and then he must apply by petition.

ON the hearing of a motion in this cause, it was objected that the person on whose behalf the motion was made, not being a party to the suit, could not move in it, but ought to have presented a petition.

The *Vice-Chancellor*, however, ruled that as the title of the applicant was stated in the notice of motion, and no long statement of facts was required to show the title, the application might be made by motion.

DUNCUFT *v.* ALBRECHT.

1841: 9th June.

Railway shares. Agreement. Specific performance. Statute of Frauds.

The Court will decree a specific performance of an agreement for the sale of a certain number of shares in a railway company.

A parol agreement for the sale of such shares, is binding; for they are neither an interest in or concerning lands, within the 4th section of the Statute of Frauds; nor goods, wares or merchandizes, within the 17th section.

BY the *London* and *Southampton* Railway Act, passed in the 4th & 5th of Wm. 4th, the subscribers to the undertaking and their successors, executors, administrators and assigns were incorporated, and were empowered to purchase and hold lands for the purposes of the undertaking, and to sell and demise or otherwise dispose of the same in the manner thereby directed, and also to raise, for the purposes of the Act, 1,000,000 *l.* which was to be divided into 20,000 shares of 50 *l.* each, and each share was to be numbered from one to twenty-thousand, and distinguished by its number, and the

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shares were to be vested in the parties raising and paying the same* and their respective successors, *executors, administrators and assigns*, to their proper use and benefit, proportionably to the sums they should severally contribute; and all subscribers for shares were to be proprietors of a proportionate share of the capital stock of the company, and were to receive a proportionate part of the profits of the undertaking; and the company were to cause the names, additions and places of abode of the subscribers, with the number of shares which they were respectively entitled to, and the amount of the subscriptions paid thereon, and also the number by which every such share should be distinguished, to be entered in a book to be kept by the secretary of the company; and the shareholders were authorized to sell or otherwise dispose of, and to transfer their shares, subject to the rules and conditions therein provided and to such restrictions and regulations as the directors might think necessary to impose; and the form of transfer was set forth in the Act; and, on every sale of a share, the deed of transfer, when executed by the seller and purchaser, was to be produced to the secretary, who was to enter, in a book, a note of the transfer, and to indorse the same on the deed of transfer, and, until such note should have been so entered, the purchaser was not to be deemed a proprietor of the company, nor to have any of the rights or privileges of a proprietor.

By an Act passed in the 1st Vict., to amend the preceding Act, the company were to cause a certificate, signed by two of the directors and the secretary, to be delivered to every proprietor, specifying the share or

* So in brief.

shares to which he should be entitled, and the certificate was to be admitted, in all Courts, as *primâ facie* evidence of the title of such proprietors, their successors, *executors, administrators or assigns*, to the share or shares therein specified; and the form of the certificate was set forth in the Act; and, in case of a transfer of any share to a new proprietor, an indorsement of the transfer on the certificate was to be considered as a new certificate; and the before-mentioned provision in the preceding Act respecting the production of the deed of transfer to the secretary, and the entry and indorsement to be made by him, was repealed, and, in lieu thereof, it was enacted that, on every sale of a share, the conveyance, having been executed by the seller and purchaser, should be produced to and kept by the secretary, and, on the production thereof and of the certificate of the share or shares sold, the secretary was to enter in a book a memorial of the transfer and sale, and indorse the entry of the memorial on the deed of transfer, and, on request, he was to make an indorsement of the transfer on the existing certificate of each share sold, and the indorsement, signed by the secretary, was to be considered the same as a new certificate, and, after the memorial should have been made and entered, the seller was to be released from all liability in respect of the share transferred, and, then and not before, the purchaser was to be deemed a proprietor, and to have the rights and privileges of a proprietor: and the company were empowered to raise an additional capital of 400,000 *l.*, to be divided into 16,000 shares of 25 *l.* each, and the shares were to be numbered from 20,001 to 36,000, and every share was to be distinguished by its number, and was to be vested in the persons who should subscribe for the same and their respective successors, executors, *administrators and assigns*, to their proper use

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and benefit, proportionably to the sums by them subscribed; and all subscribers to the new shares were to be proprietors of stock in the company, to the same extent and as beneficially as proprietors of the same number of original shares, and were to be entitled to the rights and privileges, and be under and subject to the powers, provisions, indemnities, remedies and penalties contained in the two Acts, in like manner as if the new shares had been original shares, except where altered or varied by the present Act.

By an Act of the 2d & 3d Vict., the title of the company was changed to that of "The *London* and *South-western* Railway Company."

The bill, after stating as above, alleged that, on the 17th of February 1840, the Defendant was possessed of fifty shares and upwards in the company and of the certificates for them; and that it was then agreed, between him and the Plaintiff, that, in consideration of 53 *l.* then paid to him by the Plaintiff, he should, at the Plaintiff's request, to be made at any time on or before the 31st of December 1840, transfer, to the Plaintiff, 50 shares at the price of 46 *l.* per share: that the agreement was a verbal one, but that on the same day, the Plaintiff, at the Defendant's request, reduced or put it into writing as follows: "*Manchester*, February 17th 1840. To Mr. *John Duncuft*. Sir,—In consideration of the sum of 53 *l.* this day paid to me, by you, I undertake to transfer to you, or to your nominee by indorsement hereon, at any time, upon request in writing, on or before the 31st day of December 1840, fifty shares in the *London* and *South-western* Railway, upon receiving the amount of 46 *l.* per share, with all calls paid; and I further engage to deliver, with the said fifty shares, any new shares, or

any part of a share that may be created before the expiration of this contract, and to which, as the holder of the said fifty shares, I may be entitled, on your paying me, for such new creation of shares, only such payment as I may have to make, without any interest on such payment. The transfer of the said shares to be at the expense of yourself or your nominee and to be given in exchange for this engagement, and, in default of such request by you or your nominee within the time so limited, the aforesaid sum of 53*l.*, so paid to me for the option hereby given to you of taking the shares I have so contracted to deliver, shall be forfeited to me, and my engagement as to the delivery of the said shares, shall be absolutely at an end." The bill further alleged that, in the afternoon of the 17th of February 1840, the Plaintiff presented the above memorandum of agreement or letter, to the Defendant for his signature: that the Defendant read it, and said it would require some alteration; and then wrote, on the back of it, the substance of the alterations; which the Plaintiff assented to; and it was then agreed, between the parties, that the memorandum should be re-copied and the alterations introduced in it, and, when re-copied, should be signed by the Defendant on the following morning, and that, at the same time, the Plaintiff should pay him the deposit of 53*l.*: that the memorandum was accordingly re-copied, with the alterations, and was as follows: "Sir,—In consideration of the sum of 53*l.* this day paid to me by you, I undertake to transfer, to you or your nominee by indorsement hereon, at any time, upon request in writing, on or before the 31st day of December 1840, fifty shares, with all calls paid, in the *London* and *South-western* Railway, upon receiving the amount of 46*l.* per share: and I further engage to deliver, with the said fifty shares, any new shares or any

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part of a share that may be created before the expiration of this contract, and to which, as the holder of the said fifty shares, I may be entitled, on your declaring to take such new shares certain, whether the other shares are taken or not, on your paying me, for such new creation of shares, such payment as I may have to make, with interest at the rate of 5 *l.* per cent. per annum; the transfer of the said shares to be at the expense of yourself or your nominee, and to be given in exchange for this engagement: and, in default of such request by you or your nominee within the time so limited, the aforesaid sum of 53 *l.*, so paid to me for the option hereby given to you of taking the shares I have so contracted to deliver, shall be forfeited to me, and my engagement as to the delivery of the said shares, shall be absolutely at an end: should you not take the shares before the first day of July, I am to receive any dividend that may be declared for the then past six months." The bill then alleged that, on the 18th of February 1840, the Plaintiff presented the altered agreement, to the Defendant, for his signature, and, at the same time, tendered to him the 53 *l.*; but he refused to receive the same, or to sign the altered agreement: that no more shares in the railway had been created since the date of the agreement; and that the Plaintiff made several applications, to the Defendant, between the 18th of February and the 31st of December 1840, to transfer and assign the fifty shares to him, and offered to pay the purchase-money for the same, and that, in particular, on the 5th of November 1840, the Plaintiff tendered, to the Defendant, the sum of 2,353 *l.*, being the purchase-money for fifty shares, and, at the same time, requested the Defendant to transfer and deliver the shares and the certificates thereof to him; but the Defendant refused to accept such tender or to assign the shares to the Plain-

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tiff: that, on the 6th of February 1841, the Plaintiff wrote and sent, to the Defendant, a letter requesting the Defendant to transfer and deliver, to him, the fifty shares in the railway sold to him on the 17th of February 1840; and adding that, unless the shares were so transferred and delivered, a bill would be filed, against the Defendant, for a specific performance of the contract; and that the Plaintiff and his solicitor had frequently given notice, to the Defendant, to perform the contract on his part, and that, on the 29th of December 1840, the Plaintiff's solicitor applied, to the Defendant, to accept the purchase-money for the shares, and to transfer and assign them to the Plaintiff; and the Defendant then expressly refused to perform the contract. The bill prayed that the Defendant might be decreed specifically to perform the said agreement for the sale, to the Plaintiff, of the fifty shares in the railway company, and such, if any, new shares as had been or might be created since the 17th of February 1840, and to transfer all such shares to the Plaintiff, and to deliver up the certificates thereof to him, and to account to him for any dividends which might accrue on such shares previous to such transfer; the Plaintiff being willing, thereupon, to pay, to the Defendant, the purchase-money, after deducting, thereout, such sums, if any, as might be received by the Defendant for dividends before the transfer of the shares, and the expenses of the transfer; and that the Defendant might be decreed to make compensation, to the Plaintiff, for the difference in value of any of the shares at the time when the same should be transferred to the Plaintiff, and the time within which the agreement ought to have been performed, the amount of such difference to be ascertained by the highest price which could have been obtained, in the market, for the shares, during such time as aforesaid, and that the

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Plaintiff might be entitled to retain the same out of the purchase-money.

The Defendant demurred, to the bill, for want of equity.

Mr. *G. Richards* and Mr. *Mylne*, in support of the demurrer:

It is plain, from the allegations in the bill, that the parties contemplated that there should be an agreement in writing, signed by the Defendant, before he should be bound. As then a further act was contemplated, and that act was not done, there was no concluded agreement between the parties. *Stokes* v. *Moore* (*a*). Besides, by one of the terms of the agreement, it was provided that the shares should be transferred upon a request made, by the Plaintiff, in writing, on or before the 31st of December 1840: but the bill does not allege that any request was made, in writing, on or before that day.

Secondly: the Court will not enforce the agreement in this case; for shares in a railway company, fall within the description of goods, wares and merchandizes; and, by the 17th section of the Statute of Frauds (29 Car. 2, c. 3) it is enacted that no contract for the sale of any goods, wares and merchandizes, for the price of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such

(*a*) 1 Cox, 219.

contract, or their agents thereunto lawfully authorized. In this case, none of those requisites has been complied with. Shares in a public company, have been held to be goods, within the purview of the 72d section of the Bankrupt Act (6 Geo. 4, c. 16). *Cooper* v. *Elston* (*b*); *Smith* v. *Surman* (*c*); *Mussell* v. *Cooke* (*d*). All that the case of *Bradley* v. *Holdsworth* (*e*) decides, is that railway shares are not an interest in or concerning lands, tenements or hereditaments, and, therefore, not within the 4th section of the statute.

Thirdly: the property which is the subject of the agreement in this case, is of such a nature that the Court will not decree a specific performance of the agreement. *Nutbrown* v. *Thornton* (*f*). There is a material difference between this case and *Doloret* v. *Rothschild* (*g*). In that case, the subject of the contract was identified: but here there is nothing to identify the shares agreed to be sold. The agreement does not apply to the Defendant's shares in the railway company, or to any other shares in particular: it stipulates, merely, that the Defendant shall transfer fifty shares in the company to the Plaintiff.

Mr. *Knight Bruce* and Mr. *Piggott*, appeared in support of the bill, but

The VICE-CHANCELLOR, without hearing them, said:

I do not feel any difficulty about this case; because I think that the verbal agreement, as it is stated, is quite sufficient.

(*b*) 7 T. R. 14.
(*c*) 9 Barn. & Cress. 561. See the Judgment of *Littledale*, J., p. 571.
(*d*) Prec. Ch. 533.
(*e*) 3 Mees. & Wels. 422.
(*f*) 10 Ves. 159.
(*g*) 1 Sim. & Stu. 590.

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I agree with Mr. *Richards*, that there was apparently an intention formed of varying the agreement. It was proposed, as I understand, that there should be a variation; and there was an acceptance, on the part of the Plaintiff, of the proposed variation; but then that could not bind him until the proposed variation had been accepted by the party who first proposed it. And it is plain that that was the progress of the transaction: for, first of all, certain alterations were made by indorsement upon a piece of paper, and then they were to be drawn out, so as to form an agreement which was to be signed, leaving, of course, to the party to whom it was proposed, the option of signing or not. Then the parties did not, as appears on the face of the bill, ultimately agree to the proposed variations. What was the result? Why, that the original verbal agreement stood in the manner in which it was stated originally.

In my opinion this is a case to which the 17th section of the Statute of Frauds does not apply; because it is impressed upon my mind that, in the decisions which have been made with respect to the 17th section, it has been held to apply only to goods, wares and merchandizes which are capable of being in part delivered. If there is an agreement to sell a quantity of tallow or of hemp, you may deliver a part; but the delivery of a part is not a transaction applicable, as I apprehend, to such a subject as railway shares. They have been decided not to be land. They have been decided to be, in effect, personal estate; but not personal estate of the quality of goods, wares and merchandizes within the meaning of the 17th section.

Then the only question is whether there has been any decision, from whence you can extract a conclusion that

the Court will not decree a specific performance of an agreement for the sale of such shares? Now I agree that it has been long since decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of 3 per cents. or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description; which railway shares are limited in number, and which, as has been observed, are not always to be had in the market. And, as no decision has been produced to the contrary, my opinion is that they are a subject with respect to which an agreement may be made which this Court will enforce.

Then there is nothing, as I understand, either in the Statute of Frauds or in the law of this Court, which prevents the execution of such an agreement as is here stated: and, though it may be true that the Plaintiff has asked more than this Court would give or might give under certain circumstances; my opinion is that he has stated quite enough to show that he is entitled to some relief: and, therefore, the demurrer must be overruled*.

* See *Hibblewhite* v. *M'Morine*, 6 Mees. & Welsb. 200; *Adderley* v. *Dixon*, 1 Sim. & Stu. 607; *Ex parte The Lancaster Canal Company*, Montagu's B. C. 116; and *Humble* v. *Mitchell*, 2 Railway Cases, 70.

On the 23d of July 1841, The *Lord Chancellor* affirmed the decision in the case above reported.

1841:
9th June.

DAY *v.* DAVERON.

Will.
Construction.
Fee-simple.

Testator gave a freehold house to his wife *for her sole use and benefit*, and another freehold house to her *for her life*; and he also gave to her all his household goods, plate, &c.: but, if she married again, the whole of the above property was *to become the property* of his daughter: and, in case his wife should remain unmarried, then he gave the second mentioned house to his daughter, for her life, and to her children, after his wife's death: "I also appoint my wife, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease" Held that the fee-simple in the first-mentioned house, passed to the wife.

PHILIP CALEY made his will, dated the 24th of January 1821, in the following words: "I give, devise and bequeath, unto my wife, *Sarah Caley*, all that freehold dwelling, situate in the *East India Dock Road*, in the county of *Middlesex*, now in the occupation of *Simon Kingsell*, with all the garden ground and other appurtenances thereunto belonging, and also all that cottage and stable situate at the back part of the last-mentioned dwelling-house, being also freehold, *for her sole use and benefit* after my decease: I also give and devise, unto my said wife, *Sarah Caley*, for the term of her natural life, all the rents and benefits arising from a dwelling-house in the said *East India Dock Road*, let on lease to *James Walker*, esq., of *Finsbury-square*, in the county of *Middlesex*: I also give and devise, unto my said wife, *Sarah Caley*, all my household goods, plate, linen, books and wearing apparel: nevertheless, if my said wife, *Sarah Caley*, shall marry after my decease, then this will and testament shall be void and of no effect; but the whole of the above property *shall become the property of my daughter, Ann Caley*, during her natural life, and, after that, to be divided between her children, if there should be any living; but in case my said wife *Sarah*, remains unmarried, I then give and bequeath unto my daughter, *Ann Caley*, the rents and benefit of the house now let on lease to *James Walker*, esq., after the decease of my wife, for her, *Ann Caley*'s, natural life, and to her children, if she should have any living

and if not any living, then, in that case, I give and bequeath the aforesaid dwelling-house unto the children of *William Day*, of *Marchwood*, county of *Southampton*, and the children of *Jeremiah Capan*, of the town of *Dover*, county of *Kent*, to be equally divided amongst them: I also appoint my wife, *Sarah Caley*, provided she remains unmarried, *sole executrix and residuary legatee to all other property I may possess at my decease*: And it is my wish and desire that she will pay, to *Catherine Corkhill*, the yearly sum of 10 *l.* Now, concerning *my funded property*, I hereby empower my said wife to sell out sufficient to pay all my debts, funeral expenses &c.; and, after that, I give and bequeath, unto my said wife, the one half of what remains, for her own use and benefit; the other half I give unto my daughter, *Ann Caley*, to be laid out in a Government annuity."

The testator died shortly after making his will, leaving his wife and daughter surviving. The daughter died, shortly after the testator, without having been married. In September 1839 the testator's widow died, without having married again.

The Plaintiffs were the devisees, under her will, of the freehold premises mentioned, in the testator's will, to be in the occupation of *Simon Kingsell*, and of the cottage and stable at the back thereof: and, they having agreed to sell that property to the Defendant, he objected to complete his purchase on the ground that only a life interest in the property passed, under the testator's will, to his widow.

The question as to the extent of the widow's interest,

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was brought before the Court upon the argument of a demurrer to a bill for a specific performance of the agreement.

Mr. *Wigram* and Mr. *Kenyon Parker*, in support of the demurrer:

If we stop at the end of the first devise in the will, it is clear that nothing more than a life-interest in the subject of that devise, was given to Mrs. *Caley*. The only argument in favour of her taking the fee, is grounded on the clause towards the conclusion of the will, where the testator appoints his wife residuary legatee to all other property he might possess at his decease. But it is observable that, throughout the will, the testator has used the word, 'property,' not to describe his interest, but the property itself. *Pogson* v. *Thomas* (*a*); *Kellett* v. *Kellett* (*b*).—[The *Vice-Chancellor*:—In *Pogson* v. *Thomas*, the testatrix gave all the residue of her estate and effects, wheresoever and whatsoever, to certain persons, their *executors, administrators and assigns*: therefore, it might be questionable whether anything more than personalty was meant to pass by that gift. In *Kellett* v. *Kellett*, the testator did not make his executors residuary legatees *to his property*: the word 'property,' is not used.]—Here the testator appointed his wife sole executrix and residuary legatee. Those words apply to personalty only; and, they are immediately followed by the words: 'all other property I may *possess* at my decease.' It is clear, therefore, that the testator meant to exclude the property mentioned in the previous part of his will, and to confine the residuary clause, to his personal property.

(*a*) 6 Bing. N. C. 337. (*b*) 3 Dow, P. C. 248.

At all events, the question is not so free from doubt as that the purchaser can be compelled to take the title.

Mr. *Knight Bruce* and Mr. *Pitman* appeared in support of the bill; but

The VICE-CHANCELLOR, without hearing them, said:

The question which has been discussed in this case, seems to be reasonably plain.

With respect to the question in *Kellett* v. *Kellett*, I wonder that any doubt should have been entertained upon it. There the testator, after giving several sums of money to be raised and levied from his properties by his executors, bequeathed his interest in the lands of *Barleyhill*, in the county of *Meath*, to *Richard Kellett*, the eldest son of his uncle; and then devised the remainder of his properties, to his executors, to make good the sums which he had before mentioned, and also those which he mentioned in the subsequent part of his will: and, after appointing the Rev. *W. Kellett*, Mr. *George Holdcroft* and Mr. *F. H. Holdcroft*, the executors of his will and guardians of the fortunes of his children, he expressed himself thus: "And I also ordain, appoint and devise the said Rev. *W. Kellett*, Mr. *G. Holdcroft* and Mr. *F. H. Holdcroft*, executors to this my last will and testament, also my residuary legatees, share and share alike." The heir claimed to be entitled, by way only of resulting trust, to the real estates which might remain after satisfying the legacies; and the only difficulty in the case arose upon the wording of the clause which the executors insisted was a residuary devise of the estates to them. But, as the

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testator, in that clause, had only appointed them his residuary legatees, without saying of what property they were to be residuary legatees, it was considered that those words applied to his personal property only.

Pogson v. *Thomas* was a case sent by the *Master of the Rolls* for the opinion of the Judges of the Court of Common Pleas; and I do not know whether the certificate in that case, was confirmed by his Lordship or not. It is clear, however, that the certificate was right upon the first point, that is, that the lands in the parishes of *Little Bealings* and *Playford*, did not pass by the devise of the lands situate in the parish of *Kesgrave*: and I imagine that the opinion of the learned Judges upon the other point, must have proceeded upon this, namely, that, as the testatrix gave all the residue of her estate and effects to certain persons, *their executors, administrators and assigns*, those words necessarily pointed to personal estate only.

This case, however, is reasonably plain. The testator, first, gives the property which is the subject of the present suit, to his wife, for her sole use and benefit after his decease. Next he gives a dwelling-house which was let on lease to a gentleman named *Walker*, to her for her life. Then, after providing for the event of his wife marrying again, he gives the dwelling-house, in case she remains unmarried, to his daughter after the death of his wife: but he makes no disposition, in that event, of the property comprised in the first gift to his wife. Then he says: "I also appoint my wife, *Sarah Caley*, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease." Now the words, 'residuary legatee *to* all other property,' mean the same thing as, 'residuary legatee

of all other property;' and those words carry the fee simple in every thing in which that interest was not before disposed of. It is clear, too, that that clause does not relate to personal property; for the testator, almost immediately afterwards, speaks of his funded property in a distinct sentence.

As to the objection that the testator, when he used the word, 'property,' meant the thing given and not his interest in it; it is to be observed that, in the previous part of his will, he says: "The whole of the above property, shall become the property of my daughter *Ann Caley*;" so that he clearly uses that word to denote the interest which his daughter was to take in the thing given.

I can not, therefore, but think that the will passed the fee simple in the property in question, to the testator's widow*.

[Demurrer overruled.

* See *Saumarez* v. *Saumarez*, 4 Myl. & Cr. 331; *Doe* v. *Coleman*, 6 Price, 179; and *Noel* v. *Hoy*, 5 Madd. 38. Under the recent Will Act, 7 *Will.* 4 & 1 *Vict.* c. 26, s. 28, devises of real estate without words of limitation, in wills made after the 1st of January 1838, pass the whole of the testator's interest disposable by will, unless a contrary intention appear.

1841: 10th and 11th June.

IBBETSON *v.* IBBETSON.

Exoneration. Devisee and Executor.

A., by his marriage settlement, after reciting that he was seised in fee of certain estates, subject to mortgage debts, the amount of which was mentioned and which he had contracted, settled the estates, subject expressly to the debts, on himself for life, remainder to secure a jointure for his intended wife, remainder to the first and other sons of the marriage in tail male, remainder to himself in fee, and covenanted for the title, excepting the debts: and he reserved to himself power to raise 10,000*l.* by mortgage of the estates, the mortgage to be made redeemable by the person for the time being entitled to the freehold or inheritance. *A.* exercised the power, reserving the equity of redemption to himself, his heirs, executors, &c., or the person for the time being entitled as aforesaid, and covenanted for payment of the mortgage-money. He then died without issue, having, by his will, charged his real and personal estate with his debts and bequeathed the residue of his personal estate after payment of his debts to *B.*, and having devised his remainder in fee expectant on the failure of his issue male, to his brother and his brother's sons in strict settlement. Held that they were not entitled to have his personal estate applied to exonerate the devised estates from any of the mortgage debts.

BY the settlement on the marriage of Sir *Henry Carr Ibbetson*, bart., (who was therein described as the eldest son and heir of Sir *James Ibbetson*, bart., deceased,) with *Alicia Mary Scott*, after reciting, amongst other things, that Sir *Henry Carr Ibbetson* was seised in fee in possession of the manor and capital mansion of *Denton* and other hereditaments in the county of *York*, *subject* to a rent-charge of 800*l.*, the jointure of his mother, Dame *Jenny Ibbetson, and to seven several mortgage debts* of 2,500*l.*, 1,200*l.*, 3,000*l.*, 1,400*l.*, 2,000*l.*, 1,000*l.*, and 1,000*l.*, amounting in the whole to 12,100*l.*, Sir *Henry Carr Ibbetson* conveyed the manor &c., *subject to the jointure and mortgage debts*, to trustees for the term of 99 years, and, subject to that term, to the use of Sir *Henry Carr Ibbetson* for life, with remainder to trustees to preserve &c., with remainder to the use that *Alicia Mary Scott* might receive a rent-charge of 300*l.* a year during her life, in case she

should survive Sir *Henry Carr Ibbetson*, and, after the decease of Sir *Henry Carr Ibbetson*, subject to and charged and chargeable as before mentioned, to the use of trustees for the term of 100 years, and subject to that term, *and charged and chargeable as aforesaid*, to the use of the first and other sons of the marriage in tail male, and, for want of such issue, to the use of Sir *Henry Carr Ibbetson* in fee. The trusts of the term of 99 years were for securing 200*l.* a year pin-money for *Alicia Mary Scott*, during the coverture, and the trusts of the term of 100 years were for securing to her the rent-charge of 300*l.* a year. And the settlement provided that if a power, which Sir *Henry Carr Ibbetson* had exercised by a deed of even date, of charging certain estates of which he was tenant for life, with portions for younger children, should be informally executed or otherwise fail of effect, the portions should be a charge upon the estates comprised in the settlement, *subject, nevertheless, to the claims and incumbrances subsisting thereon*: And Sir *Henry Carr Ibbetson* was empowered to charge the settled estates with any sum or sums, not exceeding 10,000*l.*, for any purpose or purposes whatsoever, with lawful interest for the same, and to mortgage the estates for a term of years, for the purpose of raising that sum, so that the mortgaged estate should be made redeemable on payment of the sum or sums so to be charged, and the interest thereof, by the person or persons for the time being entitled to the freehold or inheritance of the mortgaged estate. And Sir *Henry Carr Ibbetson* covenanted that, notwithstanding any act done by him or any of his ancestors to the contrary, *except as thereinbefore was excepted*, he had good right to convey the estates to the uses of the settlement, and that the estates should remain to those uses, and be peaceably enjoyed accordingly without any let, suit &c.

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by him or his heirs, or any person or persons claiming under him or any of his ancestors, *except as thereinbefore was excepted*, and that free from all incumbrances &c., created by himself or his heirs, or any other person or persons claiming under him or any of his ancestors, *except* such leases as were then in being, and the rent-charge of 800*l.* payable to his mother, and the mortgage debts of 2,500*l.*, 1,200*l.*, 3,000*l.*, 1,400*l.*, 2,000*l.*, 1,000*l.*, and 1,000*l.*; and that he and his heirs, and every other person claiming under him or under any of his ancestors, except persons claiming under any of the leases or incumbrances before excepted, would do all necessary acts for further conveying and assuring the estates to the uses of the settlement.

All the mortgages mentioned in the settlement, were made by Sir *Henry Carr Ibbetson*, except the mortgage for 2,500*l.*, which was made by his father, Sir *James Ibbetson*. Sir *Henry Carr Ibbetson*, from time to time after the date of the settlement, borrowed sums of money amounting, together, to 10,000*l.*; and, by deeds dated the 10th of March, the 17th of May, and the 18th of August 1806, the 20th of August 1809, the 22d of January 1810, and the 1st of June 1811, he mortgaged different parts of the settled estates, for terms of years, to the lenders, for securing the sums advanced by them respectively. Each of those deeds recited the settlement, and purported to be made in exercise of the power thereby reserved, to Sir *Henry Carr Ibbetson*, to raise not exceeding 10,000*l.* by mortgage of the estates: and, in each of the deeds, the equity of redemption was reserved to Sir *Henry Carr Ibbetson*, his heirs, executors, administrators and assigns, or the person or persons for the time being entitled to the freehold or inheritance of the hereditaments therein comprised; and

Sir *Henry Carr Ibbetson* covenanted for the title and for payment of the principal and interest thereby secured.

Sir *Henry Carr Ibbetson*, by his will, dated the 11th of October 1814, charged his real and personal estates with the payment of his funeral and testamentary expenses and debts, and the legacies he might give by any codicil; and he gave to his wife, *Alicia Mary*, a rent-charge of 400 *l.* a year for her life, in augmentation of the jointure provided for her on her marriage with the testator, *to be issuing out of his reversion or remainder in fee simple, expectant on failure of issue male of his body*, of and in his manors of *Denton* and *Askwith* in the county of *York*, and all his messuages, farms &c. in *Denton* and *Askwith* and in *Otley* and *Weston* in the same county *; and he devised *his reversion or remainder in fee simple* in the last-mentioned manors, farms &c., and also all other his real estates, to trustees, for the term of 1,000 years, and, subject to that term, to his brother, *Charles Ibbetson*, for life, with remainder to trustees to preserve &c., with remainders to *Charles Ibbetson*'s first and other sons successively in tail male, with remainders to the testator's brother, *John Thomas Ibbetson*, and his first and other sons, in like manner, with remainders to the testator's first and other daughters, whether born in his lifetime or in due time after his decease, successively, in tail male, with remainder to his sister, *Isabella Ibbetson*, for life, with remainders to her first and other sons, successively, in tail male, with remainders to his sister, *Harriet Ibbetson*, and her sons in like manner, with remainder to his own right heirs. The trusts of the term of 1,000 years were for securing the rent-charge of 400 *l.* a year, and also (in case there should be no son or sons of the testator living at his

* The settled estates.

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decease or born afterwards, or, being such, they should all die under 21 without leaving issue-male) for raising certain sums for the portions of any daughters of the testator who might happen to be living at his decease or born afterwards: And he gave to trustees all his plate, pictures, books and household furniture in and about his mansion-house at *Denton Park*, upon trust, to permit the same to be used and enjoyed by the person and persons who, for the time being, should be entitled, in possession, to his mansion-house under or by virtue of his marriage settlement, or of the limitations contained in his will, until a tenant in tail should be in possession of his mansion-house, and then the plate, pictures, books and household furniture were to go and belong to such tenant in tail; and he gave all the residue of his personal estate and effects, after payment of his just debts, funeral and testamentary expenses, and such legacies as were thereinbefore mentioned, to the person who, at his decease, should be beneficially entitled, in possession, to his mansion-house; and he appointed his brother, *Charles Ibbetson*, executor of his will.

The testator made a codicil, dated the 26th of November 1824, and thereby gave, out of his personal estate, annuities and legacies to some of his servants, and in all other respects he confirmed his will.

The testator died in June 1825 without issue, leaving his wife, Dame *Alicia Mary Ibbetson*, and his brother *Charles* (who became Sir *Charles Ibbetson*), surviving. Sir *Charles* died in 1839, leaving two sons and a daughter surviving. The Plaintiff *James Ibbetson*, was the younger of those two sons, and the Defendant Sir *Charles Henry Ibbetson* was the elder. Dame

Alicia Mary Ibbetson was still alive, and was a Defendant in the suit.

The cause was heard in 1840. (See *ante*, Vol. X. page 496.) It now came on to be heard for further directions.

The question was whether (as the Plaintiff was now interested in contending) the estates comprised in Sir *Henry Carr Ibbetson*'s marriage settlement, were solely or primarily liable to pay the mortgage debts mentioned in the settlement and created by Sir *Henry Carr Ibbetson* under the power reserved to him thereby; or whether (as it was the interest of Sir *Charles Henry Ibbetson* to contend) the personal estate of Sir *Henry Carr Ibbetson* was primarily liable to pay those debts.

Mr. *Knight Bruce* and Mr. *Richard Atkinson*, for the Plaintiff:

As the mortgage debt of 2,500 *l.* was created by Sir *James Ibbetson* and not by Sir *Henry Carr Ibbetson*, it is perfectly plain that that debt at least is not payable out of Sir *Henry Carr Ibbetson*'s personal estate. With respect to the other mortgage debts mentioned in the settlement, the estates were settled subject to them; and, in the covenants for title (which are more full and extensive than is usual in marriage settlements), and, particularly, in the covenant against incumbrances, those debts are excepted. The case, therefore, is just the same as if Sir *Henry Carr Ibbetson* had sold the estates subject to the mortgages. It appears, from Sir *Henry Carr Ibbetson*'s will, that, when he made it, he had regard to his marriage settlement, and also that he contemplated the possibility of his having issue male. If there had been such issue they could not have con-

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tended that they were entitled to have the settled estates exonerated from the mortgage debts, out of Sir *Henry Carr Ibbetson*'s personal estate: can then the contingency, which has happened, of there being no such issue, make any difference in that respect? Dame *Alicia Mary Ibbetson*, is still alive; and her jointure remains a charge upon the estates. Has she any right to say that the mortgages ought to be paid off? She takes her jointure, as the sons of the marriage, if there had been any, would have taken their estates in tail male, subject, expressly, to the mortgage debts mentioned in the settlement, and subject also to the mortgages which might be created under the power reserved to Sir *Henry Carr Ibbetson*: for that power over-rode all the limitations of the settlement.

An estate must be taken as it is found; unless an intention to the contrary, on the part of the person who eventually had the absolute ownership of it, can be discovered. *Stead* v. *Newdigate* (*a*). No such intention can be collected in the present case. Indeed, during the whole of Sir *Henry Carr Ibbetson*'s life, it was uncertain whether he would have issue male or not; and, therefore, during the whole of his life, it was for his interest to treat the settled estates as the primary fund for payment of the mortgage debts. Consequently it may be fairly contended that his intention would be disappointed, if those debts were thrown on his personal estate. *Forbes* v. *Moffatt* (*b*); *Exparte Ear Digby* (*c*); *Wilson* v. *Earl of Darlington* (*d*); *Scot* v. *Beecher* (*e*).

(*a*) 2 Mer. 521; *see* 531 and 532.

(*b*) 18 Ves. 384.

(*c*) Jac. Rep. 235. *See* the *Lord Chancellor*'s Judgment on the second point the case, p. 239.

(*d*) 1 Cox, 172.

(*e*) 5 Madd. 96.

Mr. *Wigram*, Mr. *G. Richards*, Mr. *Loftus Wigram*, and Mr. *Walford*, for the personal representatives of Sir *Henry Carr Ibbetson* and other parties in the same interest as the Plaintiff, cited *Clarke* v. *Samson* (*f*).

Mr. *Bethell* and Mr. *Koe*, for Sir *Charles Henry Ibbetson*:

Sir *Henry Carr Ibbetson* commences his will with charging his personal as well as his real estate with the payment of his debts, and he bequeaths the residue of his personal estate, after payment of his debts. The mortgages created by him before the settlement, as well as those which he created under the power, contain covenants by him to pay the mortgage debts: can it then be said that, as between him and any person not claiming under the settlement, he was not bound to pay those debts? The settlement has become inoperative except so far as Dame *Alicia Mary Ibbetson* is concerned; and the estates are greatly more than sufficient to pay her jointure.

The operation of the settlement cannot be extended beyond its proper object; and, beyond that, it left the estate precisely as it stood before the settlement was made. The title of Sir *Charles Henry Ibbetson* is derived under the will, not under the settlement. He claims by virtue of the devise which passed the original ownership remaining in the devisor subject to the settlement; that is, he derives his title out of the original ownership of Sir *Henry Carr Ibbetson*, which was unaffected by the settlement. As then he is a devisee of the original estate remaining in Sir *Henry Carr Ibbetson*, and as the debts were unquestionably the debts of

(*f*) 1 Ves. 100.

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that gentleman, they are payable out of his personal estate, in the first instance.

The case of *Forbes* v. *Moffatt* bears no analogy to the present case. There a person who had a mortgage on an state, became the owner of the fee; and it was held that the mortgage did not merge in the fee, because it was reasonable to presume that the mortgagee did not intend that it should merge. That case therefore was decided on the intention of the party. But what manifestation or indication of intention can be found, in this case, on the part of Sir *Henry Carr Ibbetson*, that, in the events which have happened, his real estates should be the primary fund to discharge these mortgages?

In *Stead* v. *Newdigate*, a person covenanted, on his marriage, to convey an estate, which he was entitled to in reversion, to trustees in trust to sell as soon as the reversion should fall into possession. He died before that event happened, and, consequently, before he was in a capacity to elect whether the estate should or should not retain the quality of personalty which it had acquired under the articles: and the Court held that it did retain that quality.—[The *Vice-Chancellor*: I understood that case to be cited in order to show that, where an intention has been once expressed, it must be held to continue until the contrary is shown.]—In that case the parties claimed under the marriage-articles, and could not show that any person was in a capacity to alter the quality which the articles (which were still binding) had given to the property. But Sir *Charles Henry Ibbetson*'s title does not arise under the settlement: that instrument has no operation beyond providing for the wife and the issue of the marriage. He

takes by virtue of the old ownership, and not by virtue of any contract.

The ground of the decision in *Ex parte Earl Digby*, was that the debt which was secured by the mortgage, was not, legally, the debt of the Duchess of *Norfolk* who made the mortgage; for, being a married lady, she could contract no debt. Then it was contended that the money borrowed was a debt as against the Duchess's separate property; but no judgment was given on that point. Here the debts, at the time they were contracted, were unquestionably the debts of Sir *Henry Carr Ibbetson*, the mortgagor; and there is no evidence of intention on his part, that, under all circumstances, they should remain charges on his real estates.

In *Wilson* v. *Lord Darlington* the decision proceeded, entirely, on the language of the will, which showed that the testator intended to revoke the deed under which the charge had been created, except so far as the 2,000*l.*, the sum charged, was concerned; that is, the will showed that the testator intended the deed to remain in force, so far as it related to the 2,000*l.* But, in the present case, there is nothing whatever to show that Sir *Henry Carr Ibbetson* intended that his personal estate should be exonerated from payment of the mortgage debts. The power to raise the 10,000*l.* was inserted, in the settlement, merely to enable him to charge that sum *as against the issue of the marriage.* The only intention was that *the issue* who should take the estates under the settlement, should take them subject to the charges to which they were then liable, and also to the charges which might be created by an exercise of the power.

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The case of *Scott* v. *Beecher* is, simply, an illustration of the ordinary rule, that, where an estate descends to an heir subject to a mortgage which was not created by his ancestor, the heir must hold the estate *cum onere*. Here all the debts, except one, were the debts of Sir *Henry Carr Ibbetson*; and there is no evidence of intention as between him and parties claiming under his will.

The VICE-CHANCELLOR:

The difficulty in this case, is that, if you claim the benefit of the common rule, then you will have the personal estate of the settlor applied to exonerate the whole inheritance; and, therefore, it will be applied contrary to the intention of the settlor. For his widow is still alive; and therefore the effect will be to exonerate the settled estates in her favour.

It is very difficult to say that there was a divided intention on the part of Sir *Henry Carr Ibbetson*, namely, that the parties who were or might become interested in his estates under the settlement, should take subject to the mortgages; but that his ultimate remainder in fee should be freed from the mortgages. Suppose that he had left a son; then that son would have been tenant in tail male of the estates; but it is not even pretended that he would be entitled to have the estates exonerated from the mortgage debts out of his father's personal estate. Can it then be said that, in case the son should die without issue-male and the ultimate remainder in fee should vest in possession, a right would then arise, to the owner of the fee, to have the estates exonerated out of the personal estate?

As the settlement was made so as to manifest an intention, on the part of the settlor, that the whole

inheritance should bear the mortgages, as well those created before as those created under the power in the settlement, notwithstanding the parties who were the objects of the limitations were the wife and issue of the settlor, I think that that intention, having been once plainly manifested, must be considered as existing until it is shown to have been altered. And, as there is nothing, in this case, which shows that that intention was ever changed, my opinion is that the common rule does not apply.

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Remoteness.
Will.
Legacy.
Trust.

JOHN BOGHURST made his will, dated t 12th of December 1809, and which was partly follows:

Testator bequeathed 3,000 *l.* to trustees, in trust, after certain life interests: "for all the children of *T. F.* (except *Thomas* the younger, *William*, *Rebecca*, *Elizabeth*, *Sarah* and *Frances*), equally to be divided between them, share and share alike; the share or respective shares of such children to become vested interests in and to be paid, assigned and transferred to them respectively, as and when they should attain their respective ages of twenty-five years:" provided that, if any of them died, before their shares became vested and payable, leaving issue, their shares should go to their issue: and the trustees were directed, in the meantime and until the shares of the children should become payable, assignable and transferable to them, to apply the income for their maintenance. The testator also bequeathed 6,000 *l.* to the same trustees, in trust, after certain life interests: "for all and every the children of *T. F.* born or hereafter to be born, equally to be divided between them, share and share alike, and to be paid, assigned and transferred to them at their respective ages of twenty-five years, and to be subject to the like descent to the lawful issue of such of them as shall die under the said age of twenty-five years, and under the like conditions and restrictions, and with the like power to apply the interest thereof for their respective maintenance, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are hereinbefore contained in relation to the several legacies hereinbefore given to or in trust for the said children respectively:" provided that in case any person to or in trust for whom any bequest, to take effect in remainder or reversion or upon any contingency, was made, should sell or incumber his interest under such bequest before the same should take effect in possession, all the bequests in favour of that person should become void. By a codicil the testator revoked a power which he had given, by his will, to the trustees, to apply, for the advancement of the legatees, the whole or part of the capital of their legacies, before they attained twenty-five, and directed that the legacies should vest in and be payable, assignable and transferable to them as if no such power were contained in his will. Held that the trusts declared of both sums, were void for remoteness.

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"I give and bequeath the sum of 25,000 *l.* three per cent. consolidated bank annuities, and also all and every the rest, residue and remainder of my goods, chattels, monies, and securities for money and personal estate and effects whatsoever and wheresoever, unto my daughter *Elizabeth Boghurst* and *Francis Barrow* and *Richard Boghurst*, their executors, administrators and assigns, upon trust, as to and concerning 12,000 *l.* three per cent. consolidated bank annuities, part of the said trust monies, to pay, assign and transfer the same unto the children hereinafter named of *Thomas Fry*, the elder, and *Elizabeth* his wife, and in the proportions following (that is to say), to *Thomas Fry*, the younger, the sum of 3,000 *l.* stock, to *William Hough Fry*, the like sum of 3,000 *l.* stock, to *Rebecca Fry*, the sum of 1,500 *l.* stock, to *Elizabeth Ann Fry*, the like sum of 1,500 *l.* stock, to *Sarah Fry*, the like sum of 1,500 *l.* stock, and to *Frances Fry*, the like sum of 1,500 *l.* stock, making, in the whole, the said sum of 12,000 *l.* stock; such several and respective sums *to become vested interests in the said Thomas Fry*, the younger, *William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry* and *Frances Fry, and to be paid, assigned and transferred to them respectively at their respective ages of twenty-five years*, or the same or any part or parts thereof respectively, to be sooner paid to them or any of them, or disposed of and applied for their or any of their preferment or advancement in the world, by my said trustees, during the lifetime and at the desire of my said daughter, *Elizabeth*, but not afterwards or otherwise. Provided always that, in case any one or more of them the said *Thomas Fry*, the younger, *William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry*, and *Frances Fry*, shall depart this life before his, her, or their aforesaid legacy or legacies shall, pursuant to the trusts of this my will, become

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vested and payable or have been sooner paid or disposed of and applied, having been married with the previous consent of my said daughter, if living, and, if dead, of my trustees or trustee for the time being, leaving lawful issue, then my will is and I do declare and direct that the legacy or respective legacies of him, her or them so dying and leaving lawful issue, having been married with such consent as aforesaid, shall go and be paid, assigned and transferred unto and equally between and among the respective issue of each of the legatees so dying, when and so soon as they can, by law, give good and effectual discharges for the same. Provided also and my will is that, if any one or more of them the said *Thomas Fry*, the younger, *William Hough Fry*, *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry*, shall die without leaving issue, or leaving any but having been married without such consent as aforesaid, before he, she or they shall attain his, her or their age or ages of twenty-five years respectively, then the share or shares of him, her or them so dying as last aforesaid, or so much thereof as shall not have been paid to him, her or them, or disposed of for his, her or their preferment or advancement in the world, shall, from time to time, go, accrue and belong to and vest in the survivors and survivor or others and other of them, in equal parts, shares and proportions, and be paid or assigned and transferred to them, him or her, or be disposed of and applied for their, his or her preferment and advancement in the world, at such time and times and in such manner and form as hereinbefore mentioned and expressed touching their, his or her original legacies or legacy: and upon this further trust that they the said trustees do and shall, in the meantime and until the said respective legacies or shares of the said *Thomas Fry* the younger, *William Hough*

Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and *Frances Fry* or of the issue of any of them dying as aforesaid, of and in the said trust monies, shall become payable, assignable or transferable to them respectively or be sooner paid to them or applied or disposed of for their respective preferment or advancement as aforesaid, pay, apply and dispose of the dividends, interest and annual produce thereof, or any part or parts thereof, for or towards their respective maintenance and education, in such manner as my said daughter, while living, and my said other trustees or trustee after her death, shall, in their, her or his discretion, think fit. And upon trust, as to and concerning the sum of 1,000*l.* three per cent. consolidated bank annuities, other part of the said sum of 25,000*l.* of like annuities, that they, my said trustees, shall and do pay the dividends of the said sum of 1,000*l.* three per cent. annuities, to *Thomas Hider*, during his natural life, and from and after his decease, shall and do pay the dividends of the said sum of 1,000*l.* three per cent. annuities, to *Mary*, the now wife of the said *Thomas Hider*, during her natural life, if she shall so long continue a widow, sole and unmarried; and, from and after the decease of the survivor of them the said *Thomas Hider* and *Mary* his wife, or second marriage of the said *Mary*, which shall first happen, shall and do pay, assign and transfer the said sum of 1,000*l.* three per cent. annuities unto *Thomas Hider* the younger, the son of the said first-named *Thomas Hider*, if he shall be then living, to and for his own use and benefit, but, if the said *Thomas Hider*, the son, shall be then dead, then my said trustees shall stand possessed of the said sum of 1,000*l.* three per cent. annuities, for the use and benefit of the said *Rebecca Fry, Elizabeth Ann Fry, Sarah Fry* and *Frances Fry*, in such and the same

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manner, and subject to the same rules, conditions and contingencies as are hereinafter mentioned and contained respecting the sum of 2,000 *l.* of like annuities, after my said daughter's decease." The will then declared trusts of 1,000 *l.* three per cent. consolidated bank annuities, other part of the 25,000 *l.* like annuities, for *William Scott*, the elder, for life, and, after his decease, for his son *William Scott* the younger, and directed the trustees, after the decease of the survivor of them, to transfer the 1,000 *l.* three per cent. annuities, to *Jane*, the wife of *Francis Jones*, the daughter of *William Scott* the younger. It then proceeded as follows: "And upon trust, as to and concerning the sum of 11,000 *l.* three per cent. consolidated bank annuities, residue of the said sum of 25,000 *l.* of like annuities, and all and every the rest, residue and remainder of my personal estate and effects of what nature or kind soever and wheresoever, that they, my said trustees, shall and do pay the dividends of the said sum of 11,000 *l.* three per cent. annuities, and the dividends, interest, and annual proceeds of the said residue of my personal estate and effects, to my said daughter *Elizabeth*, during her natural life, and from and after her decease, then upon trust, as to and concerning the sum of 3,000 *l.* three per cent. consolidated bank annuities, part of the said sum of 11,000 *l.* of the like annuities, that my said trustees shall and do, from such the decease of my said daughter, pay the dividends of the said sum of 3,000 *l.* three per cent. annuities, unto the said *Thomas Fry* the elder, and *Elizabeth* his now wife, and the survivor of them, during their joint natural lives and the life of such survivor, and shall and do after the decease of the survivor of them, my said daughter, the said *Thomas Fry* the elder and *Elizabeth* his wife, stand possessed of and interested in the said sum of 3,000 *l.* three per cent. annuities *in trust for all and*

every the child and children of the said Thomas Fry the elder and Elizabeth his wife (other than and except the said Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry) if more than one, equally to be divided between them, share and share alike, the share or respective shares of such child or children to become vested interests in and to be paid, assigned and transferred to them respectively as and when they shall attain their respective ages of twenty-five years. Provided always that, in case any one or more of such children shall depart this life before his, her or their share or respective shares of and in the said last-mentioned trust monies and premises shall, pursuant to the trusts of this my will, *become vested and payable,* having been married with the previous consent of my said trustees, leaving lawful issue, then my will is and I do declare and direct that the share or shares of him, her or them so dying and leaving lawful issue, having been married with such consent as aforesaid, shall go and be paid, assigned and transferred unto and equally between and among the respective issue of such of them so dying, when and so soon as they can, by law, give good and effectual discharges for the same: provided also, and my will is that, if any one or more of such children shall die without leaving lawful issue, or leaving any but having been married without such consent as aforesaid, before he, she or they shall attain his, her or their age, or ages of twenty-five years respectively, then the share or shares of him, her or them so dying as last aforesaid, shall, from time to time, go, accrue and belong to *and vest in* the survivors and survivor or others and other of them, in equal parts, shares and proportions, *and be paid or assigned and transferred* to them, him, or her, at such time and times and in such manner and form as is hereinbefore mentioned and expressed touching their,

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his or her original share or shares: And upon this further trust, that they the said trustees do and shall, in the meantime and until the said respective shares of the said child or children of the said *Thomas Fry* and *Elizabeth* his wife, of and in the said sum of 3,000*l.* three per cent. annuities, shall become *payable, assignable or transferable* to them respectively, pay, apply and dispose of the dividends, interest and annual produce thereof, or any part or parts thereof, for or towards their respective maintenance and education, in such manner as my said trustees shall, in their or his discretion, think fit: And upon further trust that, in case all and every such child or children of the said *Thomas Fry* and *Elizabeth* his wife (other than and except as aforesaid) shall happen to die before any of their shares of and in the said sum of 3,000*l.* three per cent. annuities, *shall become payable,* and without leaving issue to whom the same shall, according to the trusts of this my will, become payable, then my said trustees shall and do stand possessed of and interested in the same sum of 3,000*l.* three per cent. annuities, in trust for the said *Thomas Fry* the younger, *William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry* and *Frances Fry,* equally to be divided between them share and share alike, and to be paid, assigned and transferred to them in like manner and at the same time or times and to be subject to the like accruer and benefit of survivorship and the like descent to the lawful issue of such as shall die under the age of twenty-five years, and under the like conditions and restrictions, and with like power to apply the dividends thereof in, for and towards their respective maintenance and education, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are hereinbefore mentioned and contained in relation to the

sum of 12,000*l.* three per cent. annuities hereinbefore given and bequeathed to or in trust for them, so far as the same shall be then applicable to them: And upon trust, after such the decease of my said daughter, that my said trustees shall and do stand possessed of and interested in the sum of 2,000*l.* three per cent. consolidated bank annuities, other part of the said sum of 11,000*l.* of the like annuities, in trust for the said *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry*, equally to be divided between them share and share alike, and to be paid, assigned and transferred to them in like manner and at the same time and times, and to be subject to the like accruer and benefit of survivorship among them and the said *Thomas Fry* the younger and *William Hough Fry*, and the like descent to the lawful issue of such of them as shall die under the said age of twenty-five years, and under the like provisions and restrictions, and with like power to apply the dividends thereof in, for and towards their respective maintenance and education, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are hereinbefore mentioned and contained in relation to the said sum of 12,000*l.* three per cent. annuities hereinbefore given and bequeathed to or in trust for the said *Thomas Fry* the younger, *William Hough Fry*, *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry*, and *Frances Fry*, so far as the same shall be then applicable to this present bequest. And upon trust, as to and concerning the sum of 6,000*l.* three per cent. consolidated bank annuities, residue of the said sum of 11,000*l.* of the like annuities, that my said trustees shall and do, from such the decease of my said daughter, pay the dividends of the said sum of 6,000*l.* three per cent. annuities unto my said nephew *John Boghurst*, during his natural life, and from and

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after the decease of the survivor of them my said daughter *Elizabeth* and nephew *John Boghurst*, then upon trust, as to and concerning the said sum of 6,000 *l.* three per cent. consolidated bank annuities, and, after the decease of my said daughter *Elizabeth* only, as to and concerning the said residuum of my personal estate and effects, that my said trustees shall and do pay the dividends of the said sum of 6,000 *l.* three per cent. annuities, and the dividends, interest and annual proceeds of the said residuum of my personal estate and effects, to my said nephew *Richard Boghurst*, during his natural life; and, from and after his decease, then, upon trust that my said trustees shall and do stand possessed of and interested in the said sum of 6,000 *l.* three per cent. annuities and the said residuum of my personal estate and effects, in trust for all and every the child and children lawfully begotten of my said nephew *Richard Boghurst*, equally to be divided between them, if more than one, share and share alike, the share or respective shares of such child or children to become vested interests in, and to be paid, assigned and transferred to him, her or them respectively as and when he, she or they shall attain his, her or their age or respective ages of twenty-one years, and the dividends, interest and annual proceeds of his, her or their expectant share or respective shares, of and in the said last-mentioned trust monies and premises or any part thereof, to be, in the meantime and until the same shall become payable, assignable or transferable to him, her or them respectively, paid, applied and disposed of for or towards the maintenance and education of such child or children respectively, in such manner as my said trustees shall, in their or his discretion, think fit; but, in case of the death of my said nephew *Richard Boghurst* without leaving lawful issue who shall live to

attain the said age of twenty-one years, then, upon trust, that my said trustees shall and do, from and after such the decease of my said nephew *Richard Boghurst* and failure of issue as last aforesaid, pay the dividends, interest and annual proceeds of the said residuum of my personal estate and effects to my said nephew, *John Boghurst*, during his natural life; and, from and after the decease of the survivor of them my said daughter and nephews, *John Boghurst* and *Richard Boghurst*, and failure of issue of the said *Richard Boghurst* as aforesaid, then, upon trust, that my said trustees shall and do stand possessed of and interested in the said sum of 6,000*l.* three per cent. annuities and the said residuum of my personal estate and effects, and the stocks, funds and securities in or upon which the same shall be invested, in trust for *all and every the children of the said Thomas Fry the elder and Elizabeth his now wife, born or hereafter to be born, equally to be divided between them, share and share alike, and to be paid, assigned and transferred to them at their several and respective ages of twenty-five years, and to be subject to the like accruer and benefit of survivorship among all of them, and like descent to the lawful issue of such of them as shall die under the said age of twenty-five years, and under the like conditions and restrictions, and with like power to apply the dividends, interest and annual proceeds thereof, in, for and towards their respective maintenance and education, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are hereinbefore mentioned and contained in relation to the several legacies hereinbefore given and bequeathed to or in trust for the said children respectively*, so far as the same shall be then applicable to this present bequest." The will then gave the testator's real estates to his daughter *Elizabeth Boghurst* for life, with remainder to

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his nephew *Richard Boghurst* for life, with remainder to the children of the latter as tenants in common in fee, and, for want or in default of such issue, to the testator's nephew *John Boghurst*, for life, with remainder to the trustees, in trust to sell and to stand possessed of the proceeds *upon the same trusts and uses, and for the use and benefit of the same persons, in the same proportions, and to pay, assign, transfer and dispose of the same at the same times and in the like manner as he had thereinbefore or thereinafter directed in respect to the residuum of his personal estate,* or such of them as were then existing and capable of taking effect: And it declared that, in case any person or persons to or in trust for whom or for whose benefit, any devise or bequest to take effect in remainder or reversion *or upon any contingency* was made and contained in the will, should sell, mortgage or incumber, or treat or agree for the selling, mortgaging or incumbering his, her or their right, title, estate or interest in or to any such devise or bequest, or the benefit thereof, or any part thereof, while the same should continue to be in remainder or reversion or contingent, and before the same should take effect in possession, then all the devises and bequests thereby made to or in trust for such person or persons, should cease and be void, as if he, she or they were dead.

The testator made seven codicils, each of which he directed to be taken as part of his will.

The first, which was dated the 10th of February 1810, after reciting that the testator had, by his will, bequeathed certain legacies, stocks, or sums of money to or for the use or benefit of *Thomas Fry* the younger, *William Hough Fry, Rebecca Fry, Elizabeth Ann Fry,*

Sarah Fry and *Frances Fry*, and had authorised the trustees of his will, during the lifetime and at the desire of his daughter *Elizabeth*, to pay the same legacies, stock or sums of money, or part thereof, to them the said *Thomas Fry* the younger, *W. H. Fry*, *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry* respectively, or dispose of and apply the same for their preferment or advancement in the world before their attaining their ages of twenty-five, revoked the authority given, by the will, to the trustees, to pay to *Thomas Fry* the younger, *William Hough Fry*, *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry* or to apply for their benefit, the principal of the legacies given to them by the will before those legatees should attain their respective ages of twenty-five years, and directed that their legacies should *vest and be payable, assignable and transferable* to them as if no such authority were contained in the will. The codicil then gave to the trustees the sum of 400 *l.* consols, upon trust to pay the dividends to *Thomas Hider*, for his life, in addition to the bequests made to or in trust for him by the will, and, after his decease, upon trust to stand possessed of the capital in trust for *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry*, and to assign and transfer the same to them, in equal parts, shares and proportions, and at the same time and times, and under the like rules, regulations, conditions and restrictions, in all respects, as were contained, in the will, in relation to their several and respective shares of the 12,000 *l.* three per cent. bank annuities thereby bequeathed to them.

The second codicil, which was dated the 23d of July 1810, directed the trustees of the will to stand seised of certain parts of the testator's real estates after the death of *Elizabeth Boghurst*, to the use of *Thomas Fry* the

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elder and *Elizabeth* his wife for their lives and the life of the survivor; with remainder to the use of a trustee for 500 years, and, subject thereto, to the use of the eldest child of *Thomas* and *Elizabeth Fry* who should be living at the decease of his or her surviving parent, in fee. The trusts of the term of 500 years were for raising 100*l.* for each of the younger children of *Thomas* and *Elizabeth Fry* who should be living at the last-mentioned time, and paying the same to them at their ages of twenty-one.

The third codicil, which was dated the 12th of August 1813, gave to *Elizabeth Boghurst* absolutely, all the testator's ready money, goods, chattels and personal estate (except his capital stock and money in the funds) subject to the payment of his funeral and testamentary expenses and debts and the legacies therein mentioned. It then devised certain parts of the testator's real estates to the trustees, (subject to the estate for life devised, by the will, to or in trust for *Elizabeth Boghurst,*) to the use of *Thomas Fry* the elder and *Elizabeth* his wife, for their lives, and after their decease, in trust to sell and to stand possessed of the proceeds, in trust for all and every of the children of *Thomas* and *Elizabeth Fry* begotten or to be begotten (except *Thomas, William Hough, Rebecca, Elizabeth Ann, Sarah* and *Frances* and their issue), as should be living at the decease of the survivor of *Thomas* and *Elizabeth Fry,* and the issue of such of them as should be then dead leaving issue, equally to be divided between them, *per stirpes,* and not *per capita,* share and share alike, and to be paid to them respectively as and when they should respectively attain the age of twenty-one years, with benefit of survivorship amongst them in case any one or more of them shoud die under the age of twenty-one years

after the decease of *Thomas* and *Elizabeth Fry*; the surviving and accruing share or shares to be paid and divided in the same manner and at the same age and time as the original shares; and the income, in the meantime, to be applied for their maintenance, education and advancement, if the trustees should think fit.

The fourth codicil, which was dated the 18th of July 1815, revoked all the legacies and bequests by the will given to or in trust for *William Hough Fry*, and directed the trustees to stand possessed thereof, in trust, for his sisters, *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry*, and *Frances Fry*, equally to be divided between them, share and share alike, and to be payable, assignable and transferable to them at the same times, and under the like rules, regulations, conditions and restrictions as were contained in the will or any former codicil thereto, in relation to their shares of the 12,000*l.* consols.

The fifth codicil, which was dated the 23d of December 1815, after reciting that the testator had, by his will, given to or in trust for *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry*, the sum of 1,500 *l.* consols apiece, such legacies to become vested in and to be paid and assigned to them respectively at their respective ages of twenty-five years, or be sooner applied for their preferment or advancement, and with sundry other provisions concerning the same, ratified and confirmed the said bequests and the several provisions contained in the will or any former codicil thereto respecting the same: and, after reciting that the testator had, by his will and some former codicil or codicils thereto, given sundry other legacies, stock or sums of money and shares and interest in his property, to or in trust for the same persons, it declared that all such legacies, stock or sums of money,

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and share or interest in the testator's property (other than the legacies of 1,500 *l.* stock apiece), whether to take effect immediately after his decease or after the extinction of any antecedent interests therein, should, after the extinction of all such antecedent interests, vest in the trustees, in trust to pay the income thereof, in equal fourth parts, to *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry*, for their lives, for their separate use, and, after their respective deceases, upon trust to pay, assign and transfer the capital, in equal fourth parts, unto their respective children, who should attain twenty-one, being sons, or attain that age or be married, being daughters, equally to be divided between them; and in case any of them should die, without leaving any such sons or daughters, then upon trust, to pay the income of the fourth parts of those so dying to *Thomas Fry* and *Elizabeth* his wife and the survivor of them, and, after the decease of the survivor, *to pay, assign and transfer the principal to all and every the children of Thomas Fry and Elizabeth his wife, except Thomas Fry the younger, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry, and Frances Fry, equally to be divided between them, if more than one, and, if but one, then the whole to such one, and to and for their, his, or her own use and uses; the share or respective shares of such child or children to become a vested interest or vested interests in, and to be paid, assigned and transferred to him, her or them respectively when and as he, she or they should attain his, her or their age or respective ages of twenty-five years:* provided that, in case any one or more of such children of *Thomas Fry* and *Elizabeth* his wife, except as aforesaid, should die before their shares in the last-mentioned trust premises should become vested and payable leaving issue, then their shares should be paid, assigned and transferred to their issue respectively, as soon as they could give good discharges for the same; but

if any of such children should die without leaving issue and under the age of twenty-five, then that their shares should go to the survivors of them: provided that the income of the expectant shares of minors under that codicil, should be applied for their maintenance and education until their shares should become payable.

The sixth codicil, which was dated the 22d of May 1816, after reciting that the testator had, by his will and the preceding codicil, given to or in trust for *Rebecca Fry* (who had then become the wife of *Michael Comport*) 1,500*l.* consols, to become vested in, and to be paid, assigned and transferred to her at her age of twenty-five, revoked that bequest, and gave the 1,500*l.* consols, to the trustees, upon certain trusts for the benefit of *William Hough Fry*.

The seventh codicil, which was dated the 18th of April 1817, after reciting that the testator had, by his will, bequeathed 3,000*l.* consols to or in trust for *Thomas Fry* the younger, to become vested in, and to be paid, assigned and transferred to him at his age of twenty-five, revoked that bequest and bequeathed that sum to the trustees, in trust to pay the income of a part of it to *Thomas Fry* the younger, and the income of the remainder to *Thomas Fry* the elder and *Elizabeth* his wife, and after the decease of those three persons, to pay, assign and transfer the 3,000*l.* consols to *Ann Fry*, *Mary Fry*, *Charlotte Fry*, *Emily Fry* and *Charles Fry*, five of the children of *Thomas Fry* the elder, or such of them as should be living on the happening of those respective events, equally to be divided between them.

The testator died on the 1st of July 1818, leaving his daughter *Elizabeth Boghurst* his heir at law and sole

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next of kin. *Thomas Fry* the elder and *Elizabeth* his wife had eleven children, namely, *Rebecca, Elizabeth Ann, Thomas, William Hough, Sarah, Frances, Ann, Mary, Charlotte, Emily* and *Charles*: eight of them were living at the date of the will: the other three were born afterwards; and all of them survived the testator. Some of them married, after the testator's decease, with the consent required by the will, and had issue. In 1818, the Plaintiffs were appointed trustees of the will and codicils in the place of *Philip* and *Richard Boghurst*. Those two persons afterwards died; the latter of them never had any issue. *John Boghurst*, the other nephew of the testator, died in 1840. The testator's personal estate not specifically bequeathed, was exhausted in paying his funeral and testamentary expenses, debts and pecuniary legacies; and his real estates remained unsold.

Elizabeth Boghurst (who was the only acting executrix of the will and codicils) died on the 4th of May 1820. By her will, dated the 10th of December 1819, after giving certain legacies, she bequeathed all the residue of her real and personal estate to *Rebecca*, the wife of *Michael Comport*, her heirs, executors &c., and appointed *Michael Comport* and *Francis Cobb Austen* her executors.

The bill was filed against *Francis Cobb Austen* and *Elizabeth Fry*, (who had survived her husband, *Thomas Fry* the elder,) and also against the children and grandchildren of the two last-named persons. It prayed that the trusts of the will might be performed under the direction of the Court; and that the rights and interests of all parties under the same might be ascertained and declared.

Mr. *Bethell* and Mr. *Bird*, for the Plaintiffs, the trustees of the testator's will and codicils:

The questions to be decided by the Court, relate to the legacies of 6,000 *l.*, 2,000 *l.*, and 1,000 *l.*, to two of the legacies of 3,000 *l.* given by the will, and to the legacy of 400 *l.* given by the first codicil; and also to the proceeds to arise from the sale, directed by the will, of that part of the testator's real estates, which is not comprised in any of the codicils.

The principal objects of the testator's bounty, were the children of *Thomas Fry* the elder and *Elizabeth* his wife. They had eleven children; eight of whom were born at the date of the will, and three afterwards. All of them attained the age of twenty-five. The same question affects all the legacies; and that is whether a gift to children, as a class, to vest in and to be paid, assigned and transferred to them as and when they shall attain twenty-five, is not too remote: and, with respect to the proceeds of the sale of the real estates, the question is to whom they belong, that is, what part of the will and codicils contains the disposition of the testator's residuary personal estate; for he has directed, by his will, that the proceeds of the sale of his real estates, shall go to the same persons and in like manner as he had thereinbefore or thereinafter directed respecting the residue of his personal estate.

Three legacies of 3,000 *l.* are given by the will: one to *Thomas Fry* the younger, another to *William Hough Fry*, and the third (which is not affected by any of the codicils) is given, in trust, after the decease of the testator's daughter *Elizabeth Boghurst* and of *Thomas Fry* the elder and *Elizabeth* his wife, for all the children of *Thomas* and *Elizabeth Fry*, except *Thomas* the

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younger, *William Hough, Rebecca, Elizabeth Ann, Sarah* and *Frances*, equally to be divided between them, share and share alike, the shares to become vested interests in and to be paid, assigned and transferred to them as and when they shall attain their respective ages of twenty-five years; and provisions are made for the events of any of the legatees dying, leaving issue or not leaving issue, before their shares become vested and payable; and also for their maintenance and education until their shares become payable, assignable or transferable to them.

The other legacies given by the will, to which we now proceed to call the attention of the Court, are affected by one or more of the codicils. The testator, at the commencement of his will, disposes of a sum of 12,000*l.* consols, part of a sum of 25,000 *l.* consols. He gives 3,000 *l.* apiece to *Thomas Fry* the younger and *William Hough Fry*, and 1,500 *l.* apiece to *Rebecca, Elizabeth Ann, Sarah* and *Frances Fry*, making, in the whole, 12,000 *l.* consols; and he directs the sums so given to become vested interests in and to be paid, assigned and transferred to them at their ages of twenty-five. By the fourth codicil, he revokes the legacy of 3,000 *l.* given to *William Hough Fry*, and gives that sum to *Rebecca, Elizabeth Ann, Sarah* and *Frances Fry* equally, share and share alike, and to be payable, assignable and transferable to them at the same times and in like manner as their shares of the 12,000 *l.* consols. By the fifth codicil the testator directs that all the legacies, stocks or sums of money and shares or interest in his property, given to the four last-named ladies (except their legacies of 1,500 *l.* stock) shall be divided into equal fourth parts, and that one of those parts shall be in trust for the separate use of each of them for her life, and, after her

death, for her children; and, if any of them die without leaving a son who attains twenty-one, or a daughter who attains that age or marries, then that her fourth part shall be in trust for *Thomas Fry* the elder and *Elizabeth* his wife, for their lives and the life of the survivor, and, after the death of the survivor, in trust for all the children of *Thomas* and *Elizabeth Fry*, except *Thomas* the younger, *Rebecca*, *Elizabeth Ann*, *Sarah* and *Frances*, equally; the shares to become vested interests in and to be paid, assigned and transferred to them when and as they attain twenty-five. That direction affects also the interests of *Rebecca*, *Elizabeth Ann*, *Sarah* and *Frances Fry*, in the 1,000*l.* and 2,000*l.* given by the will, and in the 400*l.* given by the first codicil.

Next, with respect to the 6,000*l.* consols. That sum is given, by the will, after the deaths of the testator's daughter *Elizabeth*, and of his nephews *John* and *Richard Boghurst* and failure of issue of *Richard*, in trust for all the children of *Thomas* and *Elizabeth Fry*, born or thereafter to be born, equally to be divided between them, and to be paid, assigned and transferred to them at their ages of twenty-five. If that trust is valid, the direction in the fifth codicil before referred to, will affect the shares which *Rebecca*, *Elizabeth Ann*, *Sarah* and *Frances Fry* take under it.

Lastly, with respect to the monies to arise from the sale of the testator's real estates. Those monies are given, by the will, upon the same trusts and in like manner as the testator had thereinbefore or thereinafter directed in respect of the residuum of his personal estate. Now, in the preceding part of his will, he had given the residue of his personal estate in the same manner as the 6,000*l.*

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consols; but, by the third codicil, which he desires may be taken as part of his will, he gives the residue of his personal estate to his daughter; for he gives her all his personal estate (except his capital stock and money in the funds), after payment of his debts, funeral and testamentary expenses and legacies.

Mr. *Hodgson* and Mr. *Harwood* for *Elizabeth Fry*, *Elizabeth Ann Simmonds*, late *Elizabeth Ann Fry*, and her children, and for *Thomas Fry*, *Frances Fry*, *Ann Wynne*, late *Ann Fry*, *Charlotte Fry*, *Emily Fry*, and *Charles Fry**, and for the personal representative of *Mary Bulmer* late *Mary Fry*, deceased.

The rule in construing a will is to strive to put such an interpretation upon the language of it as will give effect to the testator's intention. That rule was acted upon in *Butler* v. *Lowe* (*a*). There the bequest was to children of the testator's nephews, begotten *and to be begotten*: and your *Honor* held that the words, "to be begotten," showed only that the testator contemplated children to be born after the date of his will and before his death; and, consequently, that the bequest was good. It is true that, in the trust expressed, as to the 3,000 *l.*, in favour of all the children of *Thomas* and *Elizabeth Fry* except the six named, the testator says that the shares of those children are to become vested interests in and to be paid and assigned to them as and when they shall attain twenty-five. But the word, 'vested,' is a word of ambiguous import: it may mean

* *Charlotte*, *Emily* and *Charles* were born after the date of the will, but in the testator's lifetime.

(*a*) *Ante*, Vol. X. p. 317.

either vested in interest or vested in possession. In the maintenance clause, the testator directs the trustees to apply *the whole* income of the shares of the children, for their maintenance and education, in the meantime and until their shares shall become payable, assignable or transferable to them, omitting the word 'vested.' That clause is sufficient to vest the interest in the shares: *Doe* v. *Ward* (*b*).—[The *Vice-Chancellor*: When do you say that the shares vested?]—At the testator's death. Where a bequest has been held to be too remote, there has been either no direct gift, or no person to answer the description: but those objections do not apply here; and, besides, there is the provision for maintenance.

We now come to the legacy of 6,000 *l.* With respect to that legacy, the testator says: "In trust for all and every the children of the said *Thomas Fry*, the elder, and *Elizabeth* his now wife, born or hereafter to be born, equally to be divided between them, share and share alike, *and to be paid, assigned and transferred* to them at their several and respective ages of twenty-five years, and to be subject to the like accruer and benefit of survivorship among all of them, and like descent to the lawful issue of such of them as shall die under the said age of twenty-five years, and under the like conditions and restrictions, and with the like power to apply the dividends, interest and annual proceeds thereof in, for and towards their respective maintenance and education, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions, as are hereinbefore mentioned and contained in relation to the several legacies hereinbefore given and

(*b*) 9 Adol. & Ell. 582. *See* Judgment, p. 604.

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bequeathed to or in trust for the said children respectively, so far as the same shall be then applicable to this present bequest." The testator, therefore, means to put the 6,000 *l.* upon the same footing as the 3,000*l.*, but he does not say a word about vesting; therefore, the irresistible conclusion is that he meant to postpone the enjoyment and not the vesting of the shares. The maintenance clause, too, is in that as well as the other gifts.

Again, the testator, in a subsequent part of his will, provides that, in case any person to or in trust for whom or for whose benefit any devise or bequest to take effect in remainder or reversion or upon any contingency, is contained in his will, shall sell, mortgage, or incumber his or her right, title or interest in or to any such devise or bequest, while the same continues to be in remainder, reversion or contingent and before the same *shall take effect in possession*, then, and from thenceforth all the devises and bequests to or in trust for such person, shall cease, determine and be void as if he or she were dead. That proviso evidently shows that the testator contemplated that the shares of the children would vest in interest before they vested in possession; and that, in the meantime, the children might disappoint his intention by selling, mortgaging or incumbering their shares; which they could not do unless their shares were vested in interest. This restraint on alienation, coupled with the provision for maintenance and the words, " to be paid, assigned and transferred," prove, irresistibly, that the testator, when he used the word, ' vested,' meant vested in possession.

In the third codicil, where the testator disposes of the proceeds of the sale of part of his real estates in favour

of the children of *Thomas* and *Elizabeth Fry* (except the six named) *who should be living at the decease of* the survivor of *Thomas* and *Elizabeth Fry*, he fixes the age of twenty-one as the time of payment. This shows that he knew that he must keep within the line of perpetuity, when the gift was to be suspended. So also in the fifth codicil, where the parties who are to take the fourth shares of his daughters, at their deaths, are persons who are to come into *esse* at a future period, he fixes the age of twenty-one years as the time at which they are to become entitled.

The distinctions which were formerly made between the words, 'at, when, and if,' are now all given up, and the Court will go as far as it can, to hold legacies to be vested. If they are given at a future time, with maintenance in the meantime, all that is suspended is the enjoyment. 1 Roper on Legacies, p. 494. *Fonereau* v. *Fonereau* (*c*); *Hoath* v. *Hoath* (*d*); *Walcott* v. *Hall* (*e*); *Lane* v. *Goudge* (*f*); *Dodson* v. *Hay* (*g*).

In this case, the words in which the children of *Thomas* and *Elizabeth Fry* (except the six named) are described, are very ambiguous: they may mean either children living at the death, or children born after the death of the testator. In the one case they take vested interests at the death of the testator, and, in the other, the provision for maintenance makes them take vested interests on their births. In *Leake* v. *Robinson* (*h*) (which will probably be cited by Mrs. *Comport*'s counsel) the gift was to *such* child or children as should

(*c*) 3 Atk. 645.
(*d*) 2 Bro. C. C. 3.
(*e*) Ibid. 305.
(*f*) 9 Ves. 225.
(*g*) 3 Bro. C. C. 404, Belt's edit.
(*h*) 2 Mer. 363.

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attain twenty-five: consequently no persons answered the description until they attained twenty-five. In this case, however, the words may be satisfied by holding that they comprise such children only as should be born at the testator's death. In *Leake* v. *Robinson* too there was, as Lord *Denman*, C. J., observes in *Doe* v. *Ward*, no direct gift, but only a direction to the trustees to pay after the happening of the event. But, here, there is a direct gift to the children. In *Bull* v. *Pritchard* (*i*) also, the individuals who were to take, could not be ascertained until they attained twenty-three. That case, however, has been considered as an unsound authority. The case of *Bland* v. *Williams* (*k*), in which Sir *J. Leach*, M. R., disapproves of *Bull* v. *Pritchard*, is an authority in our favour. For, in this as well as in that case, the shares, in many instances, are not given over, simply, on the children dying under twenty-five, but on their dying under twenty-five *without leaving issue:* and, as Mr. Justice *Patteson* observed, in *Doe* v. *Ward* (*l*), that is the key to all the cases except *Bull* v. *Pritchard*: it was the ground upon which Sir *John Leach* decided in *Bland* v. *Williams*.

Mr. *Sharpe*, for *William Hough Fry* and *Sarah Grabham*, late *Sarah Fry*, and her children:

The ultimate trust declared of the 3.000 *l.* by the will, is for all the children of *Thomas* and *Elizabeth Fry*, except the six eldest; therefore *William Hough* and *Sarah* are excluded from the benefit of that trust: and all that I have to contend for, relates to the 6,000 *l.* and the proceeds of the sale of the real estates directed to be sold by the will, which are not comprised in any

(*i*) 1 Russ. 213. (*k*) 3 Myl. & Keen, 411.
(*l*) 9 Adol. & Ell. 604.

of the codicils. Those proceeds are directed, by the will, to be held upon the same trusts as the testator had thereinbefore or thereinafter directed in respect of the residuum of his personal estate. The expression, 'thereinbefore *or* thereinafter,' is equivalent to 'therein,' and the only dispositio n of te residuary personal estate which is contained in the will, is the same as the disposition of the 6,000 *l.* The testator directs his trustees to stand possessed of that sum and the residuum of his personal estate and effects, in trust for all the children of *Thomas Fry* and *Elizabeth* his wife born or thereafter to be born, equally to be divided between them, share and share alike. So that there is a direct, absolute gift, in the first instance, to the children: and it is the payment, not the vesting of the shares that is postponed until they attain twenty-five. This case, therefore, differs, very materially, from *Leake* v. *Robinson*: for, in that case, there was no gift to the children except on their attaining twenty-five. Here too the whole income of the shares, is directed to be applied for the maintenance of the children, until the time of payment arrives.

It will, however, be said that, as the testator has directed that the shares of the 6,000 *l.* and of the residue, shall be subject to the like accruer and benefit of survivorship among the children, and the like descent to the lawful issue of such of them as shall die under twenty-five, and under the like conditions and restrictions, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as were before mentioned and contained in relation to the several legacies thereinbefore given and bequeathed to or in trust for the said children, as far as the same shall be applicable to that bequest, and as the shares of the 3,000 *l.* are to become vested interests in the children as

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and when they shall attain twenty-five and not before, therefore their shares of the 6,000 *l.* and of the residue, are not to become vested interests in them until they attain twenty-five. But, where a bequest is good as it stands, the Court will not import into it, words which will have the effect of making it void. Where a testator gives a legacy in a particular way, and says that it shall be subject to the same rules, regulations, conditions and restrictions as he had before mentioned in relation to certain other legacies, he means nothing more than that it shall be subject to such of those rules &c. as are not inconsistent with the prior gift.—[The *Vice-Chancellor*: Are not the legacies given to *William Hough Fry* revoked by the fourth codicil?]—Yes. My argument applies to *Sarah* only.

The next question is, how far the gift in question, is affected by the first codicil? The testator says: "Whereas I have, in and by my said will, given and bequeathed certain legacies, stock or sums of money to or for the use or benefit of *Thomas Fry* the younger, *William Hough Fry*, *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry*, and have authorised and empowered the trustees of my said will, during the life-time and at the desire of my daughter *Elizabeth*, to pay the same legacies, stock or sums of money or part thereof, to the said *Thomas Fry* the younger, *William Hough Fry*, *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry*, or dispose of and apply the same for their preferment or advancement in the world before their attaining their ages of twenty-five years: Now I do hereby revoke and declare null and void the power and authority so given, by my said will, to my said trustees, to pay, dispose of or apply the principal of the said legacies or any part thereof, before the said legatees

shall attain their ages of 25 years; and do declare and direct that the said legacies shall vest and be payable, assignable and transferable to the said legatees as if no such power or authority were therein contained." Those words however, do not import the word, 'vest' into the gift of the 6,000 *l.* in the will. The only effect of the direction in the codicil, is to take away, from the trustees, the power of advancing, to the children, any part of the capital of their shares, during the lifetime of *Elizabeth Boghurst*, leaving the capital to vest as it would have done under the will, that is, on the death of the testator.

Mr. *Knight Bruce*, Mr. *Jacob* and Mr. *Lee* appeared for *Rebecca Comport*: but

The VICE-CHANCELLOR, without hearing them, said:

The question whether the gifts of the 3,000 *l.* and the 6,000 *l.* are good gifts, appears to me to be plain.

The general mode which the testator has adopted in disposing of his property is this: First, he speaks of having the sum of 25,000 *l.* consols. Then he takes up a portion of it, and gives that, in certain shares, among the six children, that is, the two eldest sons and the four eldest daughters, which, altogether, amount to 12,000 *l.*; and he says, after he has divided the 12,000 *l.* into certain shares: "making, in the whole, the said sum of 12,000 *l.* stock: such several and respective sums to become vested interests in them:" then he names the six children: "and to be paid, assigned and transferred to them respectively, at their respective ages of twenty-five years." And then he says that, in case any one or more of those six children shall depart this life before his, her or their legacy or legacies shall, pursuant to the trusts of his

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will, become vested and payable, then his, her or their legacy or legacies shall go to his, her or their respective issue. Then he says that the trustees shall, in the meantime and until the respective legacies or shares of the six children shall become payable, assignable or transferable to them, pay, apply and dispose of the dividends for their maintenance. Now, *primâ facie*, he has expressly directed, in positive words, that the legacies shall become vested interests in and be paid, assigned and transferred to them at the age of twenty-five years. A legacy cannot vest at two different times; when it has once vested, it is vested for ever; and here the testator has, in the most express terms, said when the shares, of these six children, in the 12,000 *l.*, shall vest in them, and he has made an express proviso for their shares going over in the event of their dying before their shares became vested and payable. Then, when he makes a provision for the maintenance of the children and points out the time during which the maintenance shall be payable, by the expression: "until the legacies or shares shall become payable, assignable or transferable," I must, of necessity, take it that he is speaking of the time until they shall become vested; because he has before identified the paying, the transfer and the assignment with the vesting. I admit, if there was anything in the will which could control that, it ought to be taken into consideration; but I must say, so far from there being anything to control it, it rather appears to me that it is confirmed by what I shall hereafter point out.

Then the testator proceeds to make a division of the 11,000 *l.* consols; and he divides that sum in this way: he gives a sum of 3,000 *l.* consols to the children other than the six eldest; he gives the sum of 2,000 *l.* to the

four eldest daughters, and the residue of the 11,000 *l.*, which is 6,000 *l.*, to all the children.

With respect to the 3,000 *l.* he says: "In trust for all and every the child and children of *Thomas Fry* the elder and *Elizabeth* his wife, other than and except the said *Thomas Fry* the younger &c., if more than one, to be equally divided between them, share and share alike, the share or respective shares of such child or children to become vested interests in, and to be paid, assigned and transferred to them respectively, as and when they shall attain their respective ages of twenty-five years." And then there is a proviso, giving the shares over in case the legatees die before their shares became vested and payable, in exactly the same language as he had used in the similar proviso with regard to the shares of the 12,000 *l.* The testator then says that the trustees shall: "in the meantime and until the respective shares of the said child or children of and in the said sum of 3,000 *l.* shall become payable, assignable or transferable, pay, apply and dispose of the dividends, interest and annual produce thereof for their maintenance," in the same language as is before used with respect to the shares of the 12,000 *l.* Then he gives the 2,000 *l.* to the trustees, in trust for the four eldest daughters: "equally to be divided between them, share and share alike, and to be paid, assigned and transferred"—there the word 'vested,' is not used—"to them, in like manner, and at the same time and times, and to be subject to the like accruer and benefit of survivorship among them &c. &c., and under the like provisions and restrictions, and with the like power to apply the dividends thereof for and towards their respective maintenance and education, and, in all other points and respects, under and subject to the same

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rules, regulations, conditions and restrictions as are hereinbefore mentioned and contained in relation to the said sum of 12,000 *l.* hereinbefore given and bequeathed to or in trust for the said *Thomas Fry* the younger &c., so far as the same shall be applicable to this present bequest." Now the 12,000 *l.* is given so that it shall become vested in the legatees when they attain the age of twenty-five years.

Next, with respect to the 6,000 *l.* consols. After having made a gift of some preceding life interests, he says: "and, from and after the decease of the survivor of them my said daughter and nephews, then upon trust that my trustees shall and do stand possessed of and interested in the said sum of 6,000 *l.* and the said residuum of my personal estate, in trust for all and every the children of the said *Thomas Fry* the elder and *Elizabeth* his now wife, born or hereafter to be born, equally to be divided between them, share and share alike, and to be paid, assigned and transferred to them, at their several and respective ages of twenty-five years." Now it is quite plain, upon the face of this trust, that the testator meant it to include all the children, that is those who were then alive and those who might thereafter be born, whether they should be born in the lifetime of the testator or not. In a preceding part of his will, he has made an express distinction between the living children and the future children; and, here, he means to blend them altogether, and give an interest, in the 6,000 *l.*, both to living children and to future children whenever born. Then he says: "to be paid, assigned and transferred to them at their several and respective ages of twenty-five years, and to be subject to the like accruer and benefit of survivorship among all of them, and like descent &c. &c., and with the like power to

apply the dividends, interest and annual proceeds thereof, in, for and towards their respective maintenance and education, and, in all other points and respects, under and subject to the same rules, regulations, conditions, and restrictions as are hereinbefore mentioned and contained in relation to the several legacies hereinbefore given and bequeathed to or in trust for the said children respectively, so far as the same shall be then applicable to this present bequest." In my opinion those very words of reference do make the children, who were to be the participants in the 6,000 *l.*, take precisely in the same manner as those persons were to take, who were to take shares in the 12,000 *l.* and in the 3,000 *l.*

If there were any doubt upon that point, the language of the first codicil has put it beyond dispute; because the testator says: "Whereas I have, in and by my will, given and bequeathed certain legacies, stock or sums of money for the use or benefit of *Thomas Fry* the younger, *William Hough Fry*, *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry*,"—which includes everything the six eldest children are to take, either where legacies are given to them exclusively of the others, or where legacies are given to them in community with the after-born children,—"and have authorized and empowered the trustees of my will, during the lifetime and at the desire of my daughter *Elizabeth*, to pay the said legacies, stock or sums of money, or part thereof, to the said *Thomas Fry* the younger &c. or dispose of and apply the same for their preferment or advancement in the world, before their attaining their respective ages of twenty-five years: now I do hereby revoke and declare null and void the power and authority so given, by my said will, to my said trustees to

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pay, dispose of or apply the principal of the said legacies, or any part thereof, before the said legatees shall attain their respective ages of twenty-five years, and do declare and direct that the said legacies shall vest, and be payable, assignable and transferable, to the said legatees respectively, as if no such power or authority were therein contained." There the testator blends together, as constituting the same fact, the vesting, the paying, the assigning and the transferring; and he does that with respect to everything which those children might take by way of legacy. It is therefore language which expressly applies to the gift of the 6,000 *l.*, as well as to the gifts of the 2,000 *l.*, the 3,000 *l.* and the 12,000 *l.*: and the same observation may be made with regard to the language of the fifth codicil. Therefore he has shown, most clearly, that, though he has not used the term 'vested' in the bequest of the 6,000 *l.* among all the children, yet that he intended that the words: "pay, assign and transfer," which are found in the bequest of the 6,000 *l.*, should be taken to denote the time of vesting. All the children to whom the 6,000 *l.* was given, were to take in the same manner: consequently the irresistible conclusion is that, with respect to that bequest, the children were to take so as that their shares should vest in them at twenty-five.

Then, if their shares were to vest in them at twenty-five, and the members of the class who were to take, would not, of necessity and at all events, come into *esse* during a life in being, the vesting is made to depend upon an event which would not necessarily happen within a life in being and twenty-one years afterwards. Consequently this legacy falls precisely within the scope of Sir *William Grant*'s decision in *Leake* v. *Robinson*. It is impossible to separate children who might

afterwards come into *esse*, from those who were already in existence.

I think, therefore, that the legacy of 6,000 *l.*, as well as the legacy of 3,000 *l.*, is void for remoteness *.

Declare that the trusts expressed, in the will, concerning the 3,000 *l.* consols, part of the 11,000 *l.* consols therein mentioned, which were intended to take effect after the decease of the survivor of *Elizabeth Boghurst*, *Thomas Fry* the elder and the said Defendant *Elizabeth Fry*, are void for remoteness, and that the Defendant *Rebecca Comport* is entitled to the said sum of 3,000 *l.* consols as residuary legatee of *Elizabeth Boghurst* and her sole next of kin, subject only to the life interest therein of the Defendant *Elizabeth Fry*: Declare that the trusts expressed, in the will, concerning the 6,000 *l.* consols, which were intended to take effect after the decease of the survivor of *Elizabeth Boghurst* and of the testator's nephews, *John* and *Richard Boghurst*, and after the failure of issue of the said *Richard Boghurst*, are void for remoteness, and that the Defendant *Rebecca Comport* is entitled to the said sum of 6,000 *l.* consols as residuary legatee and sole next of kin of *Elizabeth Boghurst*: Declare the trusts expressed, in the codicil

* His *Honor* did not pronounce any express decision upon the question respecting the proceeds of the sale of the real estates not comprised in the codicils. If those proceeds passed by the third codicil, *Elizabeth Boghurst* was entitled to them under that codicil; but if the trusts declared of them by the will, were not affected by the third codicil, it may be inferred, from His *Honor*'s Judgment, that those trusts were void for remoteness, and, consequently, *Elizabeth Boghurst* was entitled to them as the testator's heir. *See* the extract from the Decree above.

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of the 23d of December 1815 (the fifth codicil), in favour of the children of *Thomas Fry* the elder and *Elizabeth* his wife, except *Thomas Fry*, *Rebecca Fry*, *Elizabeth Ann Fry*, *Sarah Fry* and *Frances Fry*, concerning the fourth share or shares in the said codicil mentioned of and in 3,000*l.* consols, part of 12,000*l.* like annuities originally given to *William Hough Fry*, and of and in the 1,000*l.* consols and the 2,000*l.* consols respectively bequeathed, by the said testator's will, and of and in 400*l.* consols bequeathed by the codicil dated the 18th of July 1815 (10th February 1810, *qu.*), are void for remoteness, and that *Rebecca Comport* is entitled thereto as residuary legatee and sole next of kin of *Elizabeth Boghurst*, subject to the prior trusts and interests therein declared by the last-mentioned codicil: Declare that the trusts expressed, in the will, concerning the monies to arise by sale of such of the testator's real estates devised by his will as are not comprised in the codicils of the 12th of August 1813 (the third) and the 18th of April 1817 (the seventh), are void for remoteness, and that the Defendant *Rebecca Comport*, as the devisee named in the will of *Elizabeth Boghurst*, the only child and heir at law of the said testator, is entitled to such real estates and to the rents and profits thereof accrued since the decease of the said *John Boghurst*: Order the Plaintiffs to convey the said estates to the said *Rebecca Comport*: Declare that the real estates comprised in the codicil of the 12th of August 1813, and in the codicil of the 18th of April 1817, are subject to the trusts thereof declared by the said codicils respectively*.

* See *Elliott* v. *Elliott*, *post*, p. 276.

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1841 : 10th and 15th June.

Plea. Pleading.

A bill by legatees, stated that *A.* and *B.* (the executors named in the will) proved it: that *B.* afterwards died, having appointed *A.* his executor, and *A.* proved *B.*'s will. The Plaintiffs then filed a bill of revivor and supplement against *A.*, stating that the statement, in the original bill, that *A.* had proved the first testator's will, was incorrect, and that *B.* alone had proved it: that *A.*, by proving *B.*'s will, had become the personal representative of the first testator as well as of *B.*, and that he had possessed certain of the effects of that testator. *A.* put in a plea, to the bill of revivor and supplement, stating that he had never intermeddled with the original testator's estate, and that, in *B.*'s lifetime and also since his death, he had renounced probate of the testator's will, and that, therefore, the testator's personal representative was not a party to the suit. Held that the plea was not double; the averment that *A.* had never intermeddled with the testator's estate, being necessary in order to meet the allegation, in the bill, that he had possessed certain of the testator's effects, and that averment and the other contents of the plea, amounting only to this, namely, that the character of executor of the first testator, was never in *A.*

An incorrect statement in an original bill, is not displaced by a statement to the contrary in a bill of revivor and supplement, filed by the Plaintiffs in the suit. The incorrect statement ought to be struck out of the original bill, by amendment.

A BILL of revivor and supplement in this suit, stated that, on the 21st of May 1838, the Plaintiffs filed their original bill, which was afterwards amended, and which, when so amended, was against Sir *George Strickland*, bart., *Eustachius Strickland* and *Charles William Strickland*: and that it stated that Sir *William Strickland*, deceased, by his will dated the 16th of October 1833, gave and bequeathed divers legacies, and, amongst others, he left to his brother, the Plaintiff *Henry Eustachius Strickland*, 100*l.*, and to his, the testator's, granddaughter, the Plaintiff *Frances Strickland*, 500*l.*; and appointed his sons, the Defendants Sir *George Strickland* and *Eustachius Strickland*, executors of his will: that the testator died on the 8th of January 1834; and, soon after his decease, his will was proved by the said Defendants, Sir *George Strickland* and *Eustachius Strickland*, in the proper ecclesiastical court, and that they

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possessed themselves of his personal estate and effects to a considerable amount and more than sufficient for the payment of his funeral and testamentary expenses and the legacies given by his will: and that it was thereby prayed that an account might be taken, under the direction and decree of the Court, of what was due, to the Plaintiffs respectively, for principal and interest, in respect of their legacies of 100*l.* and 500*l.*; and that the Defendants Sir *George* and *Eustachius Strickland* might be decreed to pay what should be found due, on the taking of such account, to the Plaintiffs respectively, out of the personal estate of the testator, Sir *William Strickland*; and that, in case the Defendants, Sir *George* and *Eustachius Strickland*, should not admit assets of the said testator come to their hands sufficient to answer and pay what should be found due and coming to the Plaintiffs respectively in respect of their said legacies, then that an account might be taken, under the like direction and decree, of the personal estate and effects of the said testator possessed by or come to the hands of the Defendants, Sir *George Strickland* and *Eustachius Strickland*, or either of them, or to the hands of any other person or persons by or for their or either of their order or use, and of their application thereof.

The bill of revivor and supplement then stated that the Defendants duly appeared and put in their answers to the original bill: that the statement, therein, that the Defendant Sir *George Strickland* proved the testator's will, was incorrect, *Eustachius Strickland* having alone proved the same: that, before any further proceedings were had in the original suit and on the 4th of May then last, *Eustachius Strickland* died, having made his will dated the 15th of February 1837, whereof he appointed

his brother, Sir *George*, sole executor; who, soon after the decease of *Eustachius*, duly proved his will in the proper ecclesiastical court, and thereby became and then was the legal personal representative of *Eustachius* and also of Sir *William Strickland*. The bill then stated, by way of supplement, that Sir *George* had, since the decease of *Eustachius Strickland*, possessed his personal estate and effects to a considerable amount and more than sufficient for the payment of all his funeral and testamentary expenses and just debts, and, particularly, the amount which was coming from his estate as the executor of Sir *William Strickland*; and had also possessed certain of the effects of Sir *William* to a very considerable amount: and that the Plaintiffs were advised that the suit and proceedings had become abated by the death of *Eustachius Strickland* as the legal personal representative of Sir *William*, and that the same ought to stand revived against Sir *George Strickland*, as the personal representative of *Eustachius* and Sir *William Strickland*. The bill prayed that Sir *George Strickland* might be decreed to pay what should be found due, on the taking such account as by the original bill was prayed, to the Plaintiffs respectively, out of the personal estate of Sir *William Strickland*; or that, in case Sir *George* should not admit assets of Sir *William* come to his hands sufficient to pay what should be found due to the Plaintiffs in respect to their legacies, then that an account might be taken of the personal estate and effects of Sir *William Strickland*, possessed by Sir *George Strickland* or any person or persons by his order or for his use, and of the application thereof; and that Sir *George* might either admit assets of *Eustachius Strickland* come to his hands sufficient to answer what might be found due, from his estate, to the estate of Sir *Wil-*

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liam Strickland, or that an account might be taken of the personal estate and effects of *Eustachius Strickland* possessed by Sir *George* or by any person &c., and of the application thereof, and also of his outstanding personal estate (if any): and that the suit and proceedings so abated as aforesaid might stand revived against Sir *George Strickland*, as the legal personal representative of *Eustachius* and Sir *William Strickland*.

Sir *George Strickland* put in a plea to the bill of revivor and supplement, averring that he was not the personal representative of Sir *William Strickland*, and never intermeddled with Sir *William*'s personal estate: that he did, in the lifetime of *Eustachius Strickland*, renounce the probate and execution of Sir *William*'s will; and that, since the death of *Eustachius*, he, having become the sole survivor of the executors named in Sir *William*'s will, did, by writing under his hand and seal, renounce his right, title and interest in and to the probate and execution of the said will, and also in and to letters of administration, with the said will annexed, of the goods, chattels and credits of Sir *William*: that Sir *William*'s personal representative was not made a party to the bill, nor was process thereby prayed against him; although, upon the complainant's own showing, such personal representative was a necessary party thereto.

Mr. *Knight Bruce* and Mr. *Shadwell*, in support of the plea, cited *Arnold* v. *Blencowe* (*a*); *Scott* v. *Briant* (*b*), and *Pawlet* v. *Freak* (*c*).

(*a*) 1 Cox, 426. (*b*) 6 Nevile & Mann. 381.
(*c*) Hardr. 111.

Mr. *Bethell*, in support of the bill, said that the fact that no person sustaining the character of personal representative to Sir *William Strickland*, was a party to the suit, appeared on the face of the bill of revivor and supplement; and, therefore, Sir *George* ought not to have pleaded to the bill on that ground, but ought to have demurred to it: that, if Sir *George* was entitled to avail himself of the defect in the bill by pleading to it, the plea was double; as it averred not only that Sir *George Strickland* never proved Sir *William*'s will; but also that he never intermeddled with Sir *William*'s personal estate.

Mr. *Knight Bruce*, in reply, said that, as the bill of revivor and supplement alleged that Sir *George* had possessed assets of Sir *William*, the plea would not have been a defence to the bill, unless it had negatived that allegation; for the possessing of assets would have been an acceptance of probate; and that the non-acceptance of the probate and the renunciation of it, constituted but one fact.

The VICE-CHANCELLOR:

In this case, a bill of revivor and supplement was filed, which stated that, in May 1838, the Plaintiffs exhibited their original bill against Sir *George Strickland*, *Eustachius Strickland* and *Charles William Strickland*, stating that Sir *William Strickland* made his will by which he left a legacy to each of the Plaintiffs, and appointed Sir *G. Strickland* and *Eustachius Strickland* his executors; that the will was proved by both the executors, and that they possessed themselves of the testator's personal estate and effects: and the relief asked, by that bill, was that an account might be taken of what was due, to the Plaintiffs, in respect of their

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legacies; and that the executors might be decreed to pay to the Plaintiffs, what should be found due to them on the taking of that account, out of the assets of the testator possessed by them; and, if they should not admit assets sufficient for that purpose, then that an account might be taken of the testator's personal estate and effects possessed by them. The bill of revivor and supplement then stated that the Defendants appeared and put in their answers to the original bill; that the statement that both the executors proved the will, was incorrect, and that *Eustachius Strickland* alone proved the same; that, before any further proceedings were had in the original suit, *Eustachius Strickland* died, having made his will and appointed Sir *George Strickland* his executor; that Sir *George Strickland* proved the will, and thereby became and now is the legal personal representative of *Eustachius Strickland* and also of Sir *William Strickland*, the original testator: the bill then stated that Sir *George Strickland*, had, since the death of *Eustachius*, possessed his personal estate and effects; and also had possessed certain of the effects of Sir *William Strickland*; but it did not state *when* he possessed those effects. The bill then prayed for payment, by Sir *George Strickland* out of the assets of Sir *William*, of what should be found due, to the Plaintiffs, in respect of their legacies; and, if necessary, that an account might be taken of the assets of Sir *William* and also of the assets of *Eustachius* possessed by Sir *George*: and that the suit and proceedings might stand revived against Sir *George Strickland* as the personal representative of *Eustachius* and of Sir *William Strickland*.

To that bill, a plea has been put in by Sir *George Strickland*, which states that the Defendant is not the

personal representative of Sir *W. Strickland*, and that he never intermeddled with the personal estate of Sir *W. Strickland*; and that he did, in the lifetime and that he has since the death of *Eustachius Strickland*, renounced probate and execution of the will of Sir *W. Strickland*: And the plea then says that the personal representative of Sir *W. Strickland*, is not made a party to the bill, and that process is not prayed against him.

Now it is objected, first, that this plea is bad as being double; and, also, that the defect on which it is founded, is apparent on the face of the bill, and should therefore have been brought before the Court by way of demurrer, and not by plea.

The law as laid down in *Hensloe*'s Case (*d*) has been followed in *Pawlet* v. *Freak*, *Arnold* v. *Blencowe*, and other cases; and it has never varied. The law is thus laid down in *Hensloe*'s Case: "And the Court took this difference: when many are named executors, and some of them refuse and some of them prove the will, those who refuse may afterwards, at their pleasure, administer, notwithstanding this refusal before the Ordinary: but, if all refuse before the Ordinary, and the Ordinary commits administration to another, there they cannot afterwards administer. And this difference is proved by our books in 21 Edward 4, 24*a*, where it is resolved, by the Justices, that, if twenty are named executors and one proves the will, it sufficeth for them all; and the refusal before the Ordinary is not any estoppel against them to administer after, when they please, in our law; and we have no regard, in this

(*d*) 9 Rep. 37 a.

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point, to the law of the Church: And the executor who proves, ought to name them who refuse in every action to recover the testator's debts, and they may release the whole debt: and it is clear that they who refuse, shall have an action by survivor. But it is held, in 36 Hen. 6, 8*a*, that, if a man makes two executors and both refuse before the Ordinary, now they can never after administer as executors by force of the will; for now the testator dies intestate: otherwise, when one proves and the other refuses before the Ordinary, the other may administer with him when he will."

Now, although the bill of revivor and supplement states that the statement, in the original bill, that Sir *George Strickland* proved Sir *William*'s will, was incorrect; yet it seems to me that the proper mode of correcting that statement, was not by making an averment to the contrary in the bill of revivor; but by amending the original bill by striking out of it that incorrect statement: for, as the record now stands, there is an inconsistency between the two bills: and as there is no reason why credit should be given to the one rather than to the other, the Court cannot tell which of the two statements is to be taken as the correct one.

Moreover, it is observable that, though the bill of revivor and supplement states, in effect, that Sir *George Strickland* did not prove the will of Sir *William*, yet it alleges that Sir *George* proved the will of *Eustachius*: and it further alleges that Sir *George* had possessed certain of the effects of Sir *William*; and, as it so alleges, it throws on Sir *George* the character of executor of Sir *William*; and makes it imperative upon him, in order to meet the allegation, in the bill, that he became the personal representative of Sir *William*

Strickland, not only to state that he renounced the probate of Sir *William*'s will, both in the lifetime and also after the death of *Eustachius*; but also to aver that he never intermeddled with the estate of Sir *William*. For that averment gets rid of the conclusion of law, which must have been drawn from the statement in the bill of revivor, which amounts to his having taken upon himself the character of executor of Sir *William Strickland*.

My opinion is that the averments in the plea amount only to this, that the character of executor of Sir *William*, never was in Sir *George Strickland*.

I think that the plea is not liable to either of the objections which have been insisted upon in argument, and that it is a good plea, and must be allowed.

[Plea allowed, with liberty to amend.

1841:
17th June.

Taxation. Solicitor and client. Costs.

If a person out of the jurisdiction, petitions for the taxation of his solicitor's bill, he must give security for the costs of the taxation, and also for the balance that may be found due from him.

ANON.

THE *Vice-Chancellor* ruled that, where a person who is out of the jurisdiction of the Court, petitions to have his solicitor's bill taxed, he must give security, to be approved of by the *Master*, for the costs of the petition, and also for the balance that may be found due, from him, on the taxation.

1841:
25th June.

Charity. Trustees.

On a petition for the appointment of new trustees of a charity, the Court directed that, in the deed appointing the new trustees, a power should be inserted, for appointing new trustees in future.

IN THE MATTER OF 52 GEO. 3, c. 101.

THIS was a petition presented, under Sir *Samuel Romilly*'s Act, for the appointment of new trustees of charity-property.

Mr. *Goodeve*, appeared in support of the petition; and, at his request,

The *Vice-Chancellor* ordered that, in the deed appointing the new trustees, provision should be made for the appointment of new trustees, in future.

LUMSDEN *v.* FRASER.

1841: 25th June.

Heir and executor. Intermediate rents.

An agreement was made for the sale of an estate at a future time. Before that time arrived, the vendor died intestate. Held that the rents accrued between the vendor's death and time for completing the contract, belonged to the vendor's heir, and not to his executor.

A CONTRACT was entered into for the sale of an estate, which was to be completed at a future time. Before that time arrived, the vendor died intestate as to the estate agreed to be sold. On his death, his heir entered into the receipt of the rents of the estate, and continued to receive them until the time for completing the contract, arrived. The question was whether he was entitled to retain the rents which he had received, or ought to account for them to the vendor's personal representative.

The VICE-CHANCELLOR:

If a contract for the sale of an estate is to be performed at a future time, and, before that time arrives, the vendor dies, the law casts the whole legal estate upon his heir in the meantime: and if, by virtue of the interest which so devolves upon him, he receives the rents of the property until the time for performance of the agreement arrives, the question is whether any equity then arises, to the personal representative of the vendor, which entitles him to what the heir has received?

The law favours the heir rather than the executor: and my opinion is that what the heir has received, he is entitled to keep.

Mr *Knight Bruce*, Mr. *Stuart*, Mr. *Sidebottom*, Mr. *Daniel* and Mr. *W. K. Bayley* were counsel in the cause.

1841: 8th July.

Stop-order. Stamp on letters of administration. Administrator.

A. claimed a fund in Court, as his father's administrator; but the letters of administration were not stamped to a sufficient amount. The Court refused to grant him a stop-order, until he had procured the letters to be sufficiently stamped.

Statute of Limitations (3 & 4 *Will.* 4, *c.* 27). *Residue.*

The word 'legacy,' in 3 & 4 *Will.* 4, c. 27, s. 40, includes a residue or share of a residue: *semble.*

Executor. Residue.

An executor is entitled to a residue or share of a residue bequeathed to him, although he has not proved the will.

EDWARD JOSEPH CHRISTIAN *v.* JAMES EDWARD DEVEREUX, THE COMMISSIONERS OF CHARITABLE DONATIONS AND BEQUESTS IN IRELAND and Others:

and

THE COMMISSIONERS OF CHARITABLE DONATIONS AND BEQUESTS IN IRELAND *v.* JAMES EDWARD DEVEREUX and Others.

A PETITION presented by *Edward Joseph Christian*, the Plaintiff in the cause first above mentioned, stated the will and codicil of *James Fanning* deceased, dated, respectively, in 1802 and 1804, under which (as the petition stated) and in consequence of *Januarius Fanning*, one of the residuary legatees, having died in the testator's lifetime, *Edward Christian* and the Defendant, *Devereux*, who were the other residuary legatees and the executors of the will and codicil, became entitled to the whole residuary personal estate of the testator. The petition then stated that the testator died in 1806, and that, in 1817, *Devereux* alone proved the will and codicil, and took upon himself the whole execution thereof: that *Devereux* afterwards made divers assignments of his share of the testator's residuary estate, by indentures, the dates and substance of which were stated, and thereby severed the joint-tenancy which had existed, between him and *Edward Christian*, in the testator's residuary estate, and he and *E. Christian* thereby became tenants in common thereof: that the bill in the cause secondly above mentioned, was filed for an account of what was

due in respect of a bequest made, by the testator, for the benefit of the poor of certain parishes in *Ireland*: that, pursuant to orders made in March 1823 and in May and July 1827, certain sums had been paid into court, in the last-mentioned cause, and invested in the three per cents.; and that, by the decree in that cause, dated the 8th of August 1827, the Master was ordered to take an account of what was due in respect of the charitable bequest in the testator's will: but that no account of the testator's personal estate was directed to be taken, nor was any inquiry directed to be made as to the testator's debts; and that such account had never been taken, nor had any such inquiry ever been made: that the Master, by his report made in pursuance of the decree, found that the sum of 34,286*l.* consols was due in respect of the charitable bequest; and, by an order of the 2d of June 1841, made, in the secondly above-mentioned cause, on the petition of the Plaintiffs in that cause, the report was confirmed, and it was ordered that 34,286*l.* consols, part of 46,286*l.* 14*s.* 8*d.* like stock standing in the name of the Accountant-general in trust in the last-mentioned cause, should be transferred to the Plaintiffs in that cause.

The petition then stated that *Edward Christian* was not made a party to the last-mentioned suit, or to any suit concerning the testator's estate and effects: and that he was never informed, by *Devereux* or by any other person, that he had any interest therein, or was entitled to any gift or benefit under the testator's will and codicil or either of them: that the last-mentioned suit was instituted and carried on wholly unknown to *Edward Christian*, and was so framed and conducted as that no inquiry was directed or advertisement pub-

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lished so as to give him any chance of hearing of that suit: that, towards the latter part of his life, he resided at *Hammersmith*, and died about the 20th of February 1837, intestate, and, on the 25th of June 1841, letters of administration to his estate were granted to the petitioner, who was one of his children: that the petitioner remained totally ignorant of the matters aforesaid (excepting *Edward Christian*'s death and intestacy) until the beginning of June 1841, when he was for the first time informed thereof; and, thereupon, took out the letters of administration: that the Commissioners of Charitable Donations &c. had full knowledge that *Edward Christian* was entitled as before mentioned; but, acting in collusion with *Devereux*, they abstained from making him a party to the suit instituted by them, and never gave him any notice thereof: that *Devereux* had possessed property and effects of the testator to the amount of 6,000*l.* and upwards, which he had applied to his own use: that he well knew that *Edward Christian* was entitled as before mentioned, but he never, in his answer put in in the last-mentioned suit, suggested or referred to *Edward Christian*'s rights and interests, or suggested that he should be made a party to that suit, or gave him any notice thereof or informed him that he was in any way interested therein or in the property the subject thereof: that the sum of 46,286*l.* 14*s.* 8*d.* consols still remained in court in trust in the secondly above mentioned cause: that, if that fund should be paid out, the petitioner would be deprived of the means of recovering the share of the testator's estate and effects which he was entitled to: that he had applied to *Devereux* to account for the testator's personal estate and effects, and also had requested the Commissioners of Charitable Donations &c. to forbear the distribution of so much of

the testator's estate as was represented by the fund in court, until the proper accounts of the testator's estate should have been taken and the rights of all persons interested therein should have been determined in a suit to which such persons should have been made parties; but that they had refused to comply with the petitioner's requests: that he had lately filed his bill in the first above mentioned suit, stating the matters before mentioned, and praying that it might be declared that the bequest to *Januarius Fanning* lapsed by his death and became part of the testator's residuary estate; that an account might be taken of the testator's personal estate and effects possessed by *Devereux*, and that the clear residue of the testator's estate might be ascertained; and that the petitioner, as *Edward Christian*'s personal representative, might be declared entitled to one half of such residue, and that the same might be paid, to him, either out of the fund in court, or by *Devereux*; and, if necessary, that the decree of the 8th of August 1827 and the order of the 2d of June 1841, might be reversed and discharged; and that, in the meantime, the Defendants to the first above mentioned suit, might be restrained from acting on the order of the 2d of June 1841, and from accepting or receiving any transfer or payment of or out of the fund in court.

The petition prayed that it might be declared and ordered that no part of the fund in court ought to be paid out or distributed, until the first above mentioned suit should have been heard and decided; and that such payment or distribution might be restrained by the order of the Court; and that the defendants to such suit might be restrained from acting on the order of the 2d of June 1841, and from accepting or receiving any

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transfer or payment of or out of the fund in court, until after the taking of the accounts in the same suit.

On the petition coming on to be heard, it appeared that, having regard to the amount of the property claimed by the petitioner, the stamp-duty paid on the letters of administration granted to him, was much less than the Stamp Act (55th Geo. 3, c. 184, sched. part 3) required; and it was contended that, on that account, the petition ought to be dismissed.

It was contended also that, if any share of the testator's residuary estate was given to *Edward Christian*, the payment of it could not be enforced; first, because he had not proved the testator's will; and, secondly, because his right to it was barred by the Statute of Limitations (3d & 4th W. 4, c. 27 *).

Mr. *Wakefield* and Mr. *Bacon* appeared in support of the petition.

Mr. *Knight Bruce*, Mr. *Jacob*, Mr. *Wigram*, Mr. *James Russell*, Mr. *Willcock*, Mr. *Anderdon* and Mr. *Loftus Wigram* opposed it.

With respect to the objection that *Edward Christian* had forfeited his right to the share of the residue bequeathed to him, by not proving the will,

* The 40th section of that Act enacts that no action or suit shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, *or any legacy*, but within twenty years next after a present right to receive the same, shall have accrued to some person capable of giving a discharge for or release of the same; &c. &c.

The *Vice-Chancellor* said, in the course of the argument, that, on a former occasion, he had considered the point, and that the conclusion which he had come to, was that the rule as to a legacy given to an executor who did not prove the will, did not apply to a residue; and that there was no case which decided that an executor should be deprived of his right to a residue or a share of a residue given to him, because he did not prove the will (*a*).

With respect to the objections founded on the insufficiency of the stamp affixed to the letters of administration, and on the Statute of Limitations, the Counsel for the petition said, that, before the petitioner could apply to have any part of the fund in Court paid out to him, he must obtain and produce letters of administration, having a stamp of sufficient amount on them; but, as the petitioner did not ask, on the present occasion, to have any part of the fund paid to him, or even to have his right to any portion of it declared, but asked, merely, for a stop-order, that is, that the Court would not part with the fund until the petitioner's claim had been decided on, it was sufficient for him to produce letters of administration, on which the lowest amount of duty required by the Stamp Act had been paid. Secondly, that the Statute of Limitations applied, not to a residue or a share of a residue, but merely to a legacy.

The Respondents' Counsel said that letters of administration with an inadequate stamp upon them, could not be produced, in a Court of Justice, for any purpose

(*a*) See *Griffiths* v. *Pruen*, *ante*, Vol. XI. p. 202.

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whatever. *Hunt* v. *Stevens* (*b*); *Carr* v. *Roberts* (*c*); *Thynne* v. *Protheroe* (*d*).

Secondly, that a person to whom a residue or a share of a residue was bequeathed, was a legatee; and, consequently, the term 'legacy,' in the Statute of Limitations, included a residue or a share of a residue, as well as a sum of specified amount; and that no reason could be assigned why the right to the former should not be barred by length of time, as well as the right to the latter.

The VICE-CHANCELLOR:

This case divides itself into two parts. There is, first of all, the application as against The Commissioners of Charitable Donations; and then there is the application as against Mr. *Devereux*; and it appears to me that there is a very considerable difference between the two. —[Mr. *Wakefield*: I admit that I can not support the petition as against The Commissioners of Charitable Donations.]—The *Vice-Chancellor*: Then, as to them, it is admitted that no order can be made; and, as to them, therefore, the petition must be dismissed with costs.

Then the question is with respect to the surplus of the 46,286 *l.* 14*s.* 8*d.*, after handing over, to the Commissioners of Charitable Donations, what the *Master* finds is their share. The claim which is made by the petitioner, is in his character of administrator of *Edward Christian*, who was the co-joint-tenant, with Mr. *Devereux*, of the general residue: and my opinion is that

(*b*) 3 Taunt. 113. (*c*) 2 Barn. & Adol. 905.
(*d*) 2 Mau. & Sel. 553.

there has not been a sufficient denial, by the affidavit of Mr. *Devereux*, of that general statement which is made, in Mr. *Christian*'s affidavit, as to the effect of the assignments which Mr. *Devereux* is alleged to have made of his moiety of the residue: so that it is impossible to decide what is the effect of the deeds which he has executed, without seeing them: and it seems to me that it would have been as well for Mr. *Devereux* to have gone somewhat further in his denial than he has done. I think, therefore, that, on the affidavits, it must be taken to be a point not concluded.

Next: with regard to the question as to the meaning of the word, 'legacy,' in the 3d & 4th Will. the 4th, c. 27, s. 40. I am inclined to think that, where the Act speaks of a legacy, it does, in effect, speak of a share of a residue; and it does not make any difference between a share of a residue and a legacy. But then that appears to me to be a very important point, on which I am not bound to give an opinion now.

It strikes me that there is a very wide difference between retaining a fund, which the Court has already got possession of, until a grave question has been decided; and taking a fund out of the possession of a person until the decision of the question, when, perhaps, it may not appear that the applicant has any title at all to the fund. The two cases appear to me to be extremely dissimilar. Therefore, if I only find that there is a grave question which can not be determined until the hearing of the cause; and that the fund in dispute is in this Court, I think that the same principle which (where an application is made by a party, whose title is not admitted, to have the possession, from another, of a fund which the applicant claims as his,) would lead

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me to say that the fund should remain where it is, would also lead me to say, where the fund is in Court, that it shall remain in Court: because the Court is not taking the fund from any person, but is merely keeping that which it has possession of, until the grave question is determined.

It strikes me also that there is this difficulty in this case. The bill in the petitioner's suit, is filed impeaching the order which was made in June last: and it is filed, not in the shape of a bill of review, nor in the shape of a bill asking relief against an order or a decree, on the ground that it was obtained by fraud. I use that particular phrase, because, though the bill does aver collusion, yet there is no passage, in the affidavit, which supports the bill in that respect; and, therefore, I must take it to be a bill not proceeding on the ground of collusion: and it seems to me that there may be a very great difficulty in interfering with an order made in a cause, where the bill which is filed to impeach it, is not a bill of review, nor a bill proceeding on the ground of fraud. But, notwithstanding there may be a very considerable difficulty on those grounds; I think that it is a difficulty which ought to be dealt with at the hearing.

Then the application which is made in this case, is made by a party who makes the strength of his case and the hardship of his case to consist in this, that, if the Court does not interfere, he will lose several thousand pounds: but notwithstanding the cogency of his case in respect of the largeness of the fund that he may lose, he yet contents himself with coming forward in the shape of what may almost be called a pauper administrator; he comes here with letters of administra-

tion, having no higher stamp on them than is required for the smallest amount of property mentioned in the Stamp Act. At the same time, I am willing to admit that, in cases where a claim has been made by a Plaintiff as administrator, and the suit has gone on, without any objection being made, this Court has allowed the party to recover at the hearing, if, at the time of the hearing, a proper administration is produced. I think, therefore, that it would be too harsh to say that this petition must be dismissed merely because the letters of administration, at the present moment, are not sufficiently stamped; and that a reasonable time ought to be allowed, to the party who makes the application by petition, to come to the Court with a sufficient administration.

It, therefore, appears to me, on the whole, that the fair thing is to let this petition stand over for a certain short time, giving leave, to the petitioner, in the meanwhile, to procure his letters of administration to be adequately stamped; which if he does, the proper course will be to make an order which will have the effect of retaining, in Court, the difference between the 46,286*l.* 14*s.* 8*d.*, and that share of it which clearly belongs to The Commissioners of Charitable Donations.

1841:
9th July.

CHARLTON *v.* WRIGHT.

West India estate.
Stat. 5 Geo. 2, c. 7.
Assets.
Administration.
Debtor and creditor.

THE testator in this cause, devised an estate, which he had in the *West Indies*, to his executors, in trust to sell and apply the proceeds in payment of his debts. The question was whether that estate was to be considered and dealt with as equitable or as legal assets of the testator.

Notwithstanding West India estates are made legal assets by 5 Geo. 2, c. 7, s. 4, they may be devised so as to make them equitable assets.

By the fourth sect. of 5 Geo. 2, c. 7, (for the more easy recovery of debts in his Majesty's plantations and colonies in *America*) it is enacted that the houses, lands, negroes and other hereditaments and real estates, situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are, by the law of *England*, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process, in any Court of Law or Equity in any of the said plantations, respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of for the satisfaction of debts.

That enactment and the construction put upon it by Sir *T. Plumer* in *Thomson* v. *Grant* (*a*), were relied upon by

Mr. *Knight Bruce* and Mr. *Berkeley*, who contended that the estate was made legal assets by the Act of Parliament, and that it was not in the power of the testator to make it equitable assets.

Mr. *Jacob*, Mr. *Blunt* and Mr. *Cole* were the other Counsel in the cause.

The *Vice-Chancellor* said that, as the Act of Geo. 2, had not taken away the power, which testators had before the passing of that Act, to dispose of their estates so as to make them equitable assets; that power still remained; and, consequently, the estate in question was equitable assets.

(*a*) 1 Russ. 540, note.

1841: 16th July.

ELLIOTT *v.* ELLIOTT.

Will. Construction. Remoteness.

Testator gave the residue of his personal estate unto and among all and every the children, sons and daughters, of his daughter *Elizabeth*, in equal shares and proportions, as and when they should attain their respective ages of twenty-two years. Held that the children of the testator's daughter living at the testator's death, were the only objects of the bequest; and, consequently, that it was not void for remoteness.

THE testator in this cause gave a legacy of 1,000 *l.* to his daughter *Elizabeth Elliott*, and all other his personal estate and effects unto and among all and every the children, sons and daughters, of his said daughter, in equal shares and proportions, as and when they should attain their respective ages of twenty-two years; and he directed the interest on their respective shares to be accumulated and to be paid to them as and when the principal should be payable.

Mrs. *Elliott* had four children living at the testator's death, and one born four years afterwards.

Mr. *J. H. Palmer*, for the Plaintiff Mrs. *Elliott*, who was the testator's sole next of kin, said that the residue was given to *all* the children of Mrs. *Elliott*, as a class; and, as their shares were not to vest in them until they attained the age of twenty-two, the gift was wholly void for remoteness. *Leake* v. *Robinson* (*a*); *Vawdry* v. *Geddes* (*b*).

Mr. *Knight Bruce* and Mr. *Hare*, for the children of Mrs. *Elliott*, said that, where a bequest was made to *A.* for life, and, after *A.*'s death, to his children, the testator was taken to mean all the children who might come into existence during *A.*'s life; but, where no prior life interest was given, the testator must be supposed

(*a*) 2 Mer. 363.

(*b*) 1 Russ. & Myl. 203. See *Comport* v. *Austen*, *ante* 218.

to mean all the children who might be in existence at his death. *Viner* v. *Francis* (*c*) and *Davidson* v. *Dallas* (*d*).

Mr. *W. K. Ellis* for the executor.

The VICE-CHANCELLOR:

I see no objection, in principle, to holding that, by the description: "all and every the children, sons and daughters of my daughter *Elizabeth Elliott*," the testator meant those children who were then living or might be living at his death; and then there is no objection to the gift.

When a testator speaks of the children of his daughter, the reasonable construction is that he means such children as his daughter has at his death, at which time the will speaks.

Declare that the gift in question is a gift to such of the children of the testator's daughter as were living at the testator's death.

(*c*) 2 Cox, 190. (*d*) 14 Ves. 576.

1841: 16th and 19th July.

Infant heir. Decree.

In a decree for raising legacies against an infant heir of a devisee whose estate was charged with the legacies, a sale to raise the requisite amount will be directed, but the infant will not then be declared a trustee, so as to enable the Court to order a conveyance under the 6th and 18th sections of 1 Will. 4, c. 60.

WALTERS *v.* JACKSON*.

IN this case a bill was filed by legatees whose legacies were charged on land of which the infant heir of a devisee under the will was seised. The object of the bill was to have the legacies (on a deficiency of personal estate) raised by sale of a competent portion of the land.

All the accounts having been taken and the amount to be raised out of the infant's estate having been ascertained, the cause came on for further directions; when, a sale of a part of the infant's estate being necessary, a question arose as to the form of the order to be pronounced.

Mr. *G. Richards* and Mr. *Renshaw*, for the Plaintiffs, contended that it was proper under 1 Will. 4, c. 60, ss. 6 & 18 (the 1 W. 4, c. 47, not applying to the case), that the infant should at once be declared to be a trustee, for the legatees, to the extent of the sum to be raised for them, and that a sale and conveyance should be ordered (*a*).

Mr. *Lee*, for the infant, mentioned a case of *Godfrey* v. ——, in which Lord *Langdale*, M. R., directed a sale, and declared that, upon the sale taking place, the infant would become a trustee for the purchaser of the estate.

* *Ex relatione.*

(*a*) See *Broom* v. *Broom*, 3 M. & K. 443.

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The *Vice-Chancellor* refused then to make any further order than for a sale of a competent portion of the property; and said that the direction for sale, would be a good ground for the declaration which might be made on a petition to be presented for a conveyance after the sale should have taken place. He mentioned a M.S. case, in 1836, in which, under similar circumstances, he had made the like order.

1841: 22d July.

PLUNKETT *v.* LEWIS.

Practice. Exceptions. Report.

Plaintiff served Defendant with an order confirming a report *nisi*: and, on the eighth day after, exclusive of the day of service, he applied for the registrar's certificate of no cause shown, but which the Registrar declined to give without the production of counsel's brief on a motion to make the order absolute, which (it was said) could not be made until the then next seal. On the ninth day, the Defendant filed exceptions to the report. Held that the exceptions were regularly filed.

MOTION, by Plaintiff, that exceptions filed, on behalf of the Defendant, to the *Master*'s report dated the 16th of June 1841, might be taken off the file for irregularity.

The affidavit in support of the motion, stated that the order confirming the report *nisi*, was obtained and served on the 23d of June 1841; that the deponent applied, at the Report-office, on the 1st of July, being the eighth day after the order *nisi* was served exclusive of the 23d of June, for the Registrar's certificate of no cause shown; but which was declined without the production of counsel's brief on a motion *to make the order absolute*, which (it was said) could not be made until the then next seal: that the deponent had been informed and believed that the order to set down the exceptions, which was dated the 1st of July 1841, was not served upon the Plaintiff's clerk in court, until the second of

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that month; in which case the said order was not served in due time according to the practice of the Court.

Mr. *Knight Bruce*, in support of the motion, cited *Manners* v. *Bryan* (*a*), and *Mole* v. *Smith* (*b*).

Mr. *Wakefield* and Mr. *K. Parker*, for the Defendant, said that, as the exceptions were filed before the certificate of no cause shown was obtained, they were filed in due time.

The VICE-CHANCELLOR:

I rather think that the right meaning of the order *nisi*, is that the order will be made absolute if no cause is shown *and that fact is certified* (*c*).

(*a*) 1 Myl. & Keen, 453. (*b*) 1 Jac. & Walk. 665.
(*c*) *See* 2 Smith's Pract. 2d edit. 363, 364.

BEATSON v. BEATSON.

1841: 23d and 30th July.

Volunteer. Voluntary settlement. Revocation.

A single lady having, under a will, a general power of appointment over a fund, made a voluntary appointment of it to trustees, in trust for her separate use, for life; remainder for any husband whom she might marry, for life; remainder for her children by any husband or husbands

MARIA THERESA NOWELL bequeathed two seventh parts of her residuary personal estate, to trustees, in trust to pay the interest thereof, to her niece, *Margaret Marion Humfrays*, spinster, for her life, for her separate use, and, after her decease, in trust to pay the principal to such person or persons &c. as she should, by deed, appoint.

Margaret Ursula Humfrays bequeathed to trustees, 8,675*l.* three-and-a-half per cent. reduced annuities, in trust to pay the dividends to her daughter, the said *Margaret Marion Humfrays*, so long as she should continue unmarried; and, in the event of *M. M. Humfrays'* marriage, the testatrix directed 5,000*l.* reduced annuities, part of the 8,675*l.* like annuities, to be transferred to her or to such person or persons and upon such trusts as she, either before or after her marriage, whomsoever. A few months afterwards, she, being still unmarried, revoked the appointment (although she had not reserved to herself any power to do so), and made another voluntary appointment of the fund, to other trustees, in trust as she should appoint by deed or will. She then married; and, *afterwards*, by virtue of the power reserved to her by the last deed, she executed another voluntary deed, by which she declared that the trustees of the prior deed should stand possessed of the fund in trust as she and her husband should appoint, and, in default, in trust for her husband and herself for their lives successively, remainder for their children. The fund still remained in the names of the trustees of the will. The Court, in a suit by the wife and the last-mentioned trustees, against the husband, the trustees of the will and the trustees of the first-mentioned deed, decreed (with the husband's concurrence) the trustees of the will to transfer the fund to the trustees of the last deed upon the trusts thereof. [*Sloane* v. *Cadogan* observed upon.

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riage, should, by deed, appoint: and the testatrix directed that the trustees should stand possessed of the residue of the 8,675 *l.*, in the event of her daughter's marriage, as part of the residue of her own estate.

By an indenture of settlement dated the 13th of June 1839, and made between *Margaret Marion Humfrays* and certain persons who were trustees of the settlement, after reciting that *Margaret Marion Humfrays*, being about to embark for *India* where she was engaged to be married, had then lately determined, in contemplation of her intended marriage, to make such several appointments and settlement of the 5,000 *l.* reduced annuities, and of her two seventh parts of Mrs. *Nowell*'s residuary estate, as thereinafter stated; and that, in pursuance of such determination, by a deed poll of even date with the settlement, she had absolutely and irrevocably appointed that, from and immediately after her *marriage with any person whomsoever*, the trustees of Mrs. *Nowell*'s will should transfer the said two seventh parts to the trustees of the settlement, upon the trusts thereby declared thereof; and that, in further pursuance of her said determination, by another deed poll of even date with the settlement, she had absolutely and irrevocably appointed that, immediately after her marriage with any person whomsoever, the trustees of her mother's will should transfer 4,000 *l.* reduced annuities, part of the 8,675 *l.* like annuities, to the trustees of the settlement, upon the trusts thereby declared thereof; and that, by the same deed poll, she had appointed that, immediately after her marriage with any person whomsoever, the trustees of her mother's will should transfer the sum of 1,000 *l.* reduced annuities, making, together with the 4,000 *l.* like annuities, the sum of those annuities over which she had a power of appointment, to the person

with whom she should have intermarried, for his own absolute use: it was agreed and declared that the trustees of the settlement should stand possessed of the two seventh parts of Mrs. *Nowell's* residuary estate and of the 4,000 *l.* reduced annuities, in trust for *Margaret Marion Humfrays* for her life, for her separate use, and, after her death, for any husband with whom she might have intermarried, for his life; and, subject thereto, in trust for her children *by any husband or husbands whomsoever*, and, if she should not leave any child or any husband surviving her, in trust for her executors &c.; but, if she should leave a husband, then in trust for her next of kin, exclusive of her husband.

Margaret Marion Humfrays sailed for *India* in July 1839, and arrived there in November following.

Soon after her arrival, she became dissatisfied with the settlement and deeds poll of June 1839, and was desirous of revoking and annulling them; and, accordingly, an indenture of the 30th of December 1839 was made between her and *Alexander Humfrays*, *R. W. Beatson* and *C. Becher*, which recited that, when she executed the deeds of June 1839, she was not fully aware of their nature and effect, or how they affected her own rights or the rights of any husband whom she might marry, and that she received no valuable consideration for executing them; but was under an erroneous impression that it was necessary and imperative upon her to execute them before she left *England*, and that they would not, and that she never intended that they should be binding on her, unless the provisions of them should be approved of by such husband as she might marry; and that, accordingly, she caused the following memorandum to be indorsed, for the

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signature of such husband in case he should approve of the same, on an attested copy of the settlement furnished to her previously to her leaving *England*: "I hereby approve of and allow, ratify and confirm the settlement which was made and executed, by my intended wife, Miss *Margaret Marion Humfrays*, previously to her quitting *England*, and of which the within is certified to be an attested copy:" that she executed the deeds of June 1839 under the belief that she could, at any time before her marriage, revoke the same or alter the provisions or limitations thereof, and substitute other provisions or limitations for the same, if the same should not be approved of by such husband, and that no transfer of the trust funds would be made, to the trustees of the settlement of June 1839, until the solemnization of any such marriage; and that, at the times of executing the settlement and deeds poll and of making the indorsement on the attested copy of the settlement, she was under the impression and belief that those deeds were not and would not be complete and delivered deeds and binding on her or any husband with whom she might intermarry, until the indorsement should be signed by such husband, but that the said deeds would remain in the nature of escrows, and would be held, by the trustees of the settlement, as such, and not as binding and operative deeds, until such consent and approval should be given by such husband: that, since her arrival in India, she had had the settlement fully explained to her, and that she was then made fully aware, and then, for the first time, fully understood the true nature and legal effect of it and of the deeds poll; and, being dissatisfied with the same and the contents of the settlement, by reason of the effect thereof being contrary to what she intended at the time of executing the said deeds, she, being still

unmarried, had resolved to revoke and set aside the settlement and deeds poll and the trusts &c. therein contained, and, instead thereof, to make and substitute such appointments, directions, trusts &c. as, in the indenture now in statement, were mentioned; and that the endorsement still remained unexecuted. The indenture of December 1839 then witnessed that, for the causes and considerations therein mentioned, and for certain other good and valuable considerations her thereunto moving, and in consideration of 10 *s.*, *Margaret Marion Humfrays* did thereby revoke the settlement of June 1839, and all the uses, trusts &c. therein contained, and also the two deeds poll and the appointments thereby made: and, by the same indenture, she directed the trustees of Mrs. *Nowell's* will not to transfer the two seventh parts of the residue of that testatrix's estate, and the trustees of her mother's will not to transfer the 5,000 *l.* reduced annuities to the trustees of the settlement of June 1839; but to transfer such two seventh parts to *Alexander Humfrays* and *R. W. Beatson* and *C. Becher*, upon such trusts &c. as she, whether she should be then sole or covert, should, by any deed or deeds, to be by her sealed &c. appoint; and, in default of such appointment, then, as she, whether then sole or covert, should, by her will appoint; and, in default of any such appointment, in trust for such person as should be her husband at the time of her decease; or, in case she should die unmarried or without leaving any husband her surviving, then in trust for her next of kin.

In February 1840, *Margaret Marion Humfrays* married *W. Fergusson Beatson* in *India*; and, by a settlement dated the 12th of August 1840, she and her husband directed *A. Humfrays*, *R. W. Beatson* and

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C. Becher to stand possessed of the two sevenths of Mrs. *Nowell*'s residuary estate, and also of the 5,000*l.* reduced annuities, in trust as she and her husband should jointly appoint, and, in default of such appointment, in trust for her husband and herself for their lives successively, and, subject thereto, in trust for the children of their marriage, and, in default of children, in trust as she and her husband or the survivor of them should appoint, and subject thereto, in trust for the survivor absolutely.

The bill, which was filed, by Mrs. *Beatson* and the trustees of the last-mentioned settlement, against *W. F. Beatson* and the trustees of Mrs. *Nowell*'s and Mrs. *Humfrays*'s wills and of the settlement of June 1839, after stating as above, alleged that, under the circumstances aforesaid, the settlement and deeds poll of June 1839, were revoked and annulled, and ought to be delivered up, to Mrs. *Beatson*, to be cancelled, and that the trustees of the two wills ought to transfer the two sevenths and the 5,000*l.* reduced annuities to the trustees of the indentures of December 1839 and August 1840: that the deeds of June 1839 were not (as the Defendants pretended) absolute and irrevocable, and were not binding on Mrs. *Beatson* or any husband whom she might marry, but that she had power to revoke and annul the same; that she never intended those deeds to bind herself or any future husband whom she might marry, but intended that the provisions thereof should be approved of by any person whom she should intend to marry; and that she fully believed and was convinced that, in case the husband whom she should intend to marry, should not approve of them, or in case she should become dissatisfied therewith, she had full power to revoke and annul the same and to make and

substitute any new appointment of the trust funds; and that she executed the deeds of June 1839 under the circumstances and in the belief aforesaid.

The bill prayed that the trusts of the deeds of December 1839 and August 1840, might be established; and that the deeds of June 1839 might be declared inoperative; and that the trustees of the wills might be decreed to transfer the trust funds to the trustees of the deeds of December 1839 and August 1840.

The trustees of the settlement of June 1839, after admitting, by their answer, that that deed and the deeds poll were to the effect stated in the bill, said that Mrs. *Beatson*, soon after her arrival in *India*, did resolve to revoke those deeds, not for the reasons alleged by the bill, but because she and her then intended husband were desirous to have the power of defeating the provision thereby made for her and her children in the event of her marriage; and that the deeds of December 1839 and August 1840 were made for that purpose; that the deeds of June 1839 were in their (the Defendants') possession; and that they had received, at different times, various letters relating thereto, all of which, except those contained in the schedule, they had destroyed before the bill was filed, supposing them to be of no importance. They added that they were advised that the last-mentioned deeds were not revocable by Mrs. *Beatson*, but that she and her children would be entitled, in equity, to the benefit of the provision thereby intended to be made for them. It did not however appear that Mrs. *Beatson* had any issue.

Mr. *Knight Bruce* and Mr. *Loftus Wigram*, for the Plaintiffs:

No doubt can be entertained as to the inefficacy of

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the deeds of June 1839; they were mere voluntary dealings with two *choses in action*, without any communication made to the trustees of them.—[Mr. *Teed*, for the trustees of the settlement of June 1839: I am instructed that the trustees of Mrs. *Nowell's* and Mrs. *Humfrays's* wills, had notice of the deeds of June 1839.]—That fact is not stated, nor is there any evidence of it: but, whether the trustees had notice of it or not, Mrs. *Beatson* remained mistress of the funds.—[The *Vice-Chancellor*: I presume that the funds remained, all along, as they originally stood.]—Yes: they remained in the names of the original trustees. In *Bill* v. *Cureton* (*a*), which probably will be cited in support of the settlement of June 1839, the legal title to the fund in dispute, was complete in the trustees.

Mr. *Jacob* and Mr. *Kyle*, for *William Ferguson Beatson*:

The appointments and settlement of June 1839, were not made in favour of any existing husband and children, but of a husband and children *quando acciderint*. A Court of Equity will not give effect to an assignment or disposition of a *chose in action*, made without consideration. *Edwards* v. *Jones* (*b*); *Tufnell* v. *Constable* (*c*).

Mr. *Teed* and Mr. *Wood*, for the trustees of the settlement of June 1839:

When the deeds poll and the settlement of June 1839, were executed, and notice of those instruments was given to the trustees of the funds (as we are in-

(*a*) 2 Myl. & Keen, 503.
(*b*) *Ante*, Vol. VII. p. 325; and 1 Myl. & Cr. 226.
(*c*) *Ante*, Vol. VIII. p. 69.

structed was the case), everything was done that could be done to give effect to those instruments; and the trustees of the funds, then became trustees for the objects and purposes of that settlement. Mrs. *Beatson* did not reserve, to herself, any power to revoke the deeds of June 1839, and, consequently, it was not in her power to revoke them. Moreover, the parties who now ask the Court to set aside the voluntary deeds of June 1839, are, themselves, volunteers. This case falls within the principle of *Bill* v. *Cureton*, *Petre* v. *Espinasse* (*d*), and of Sir *William Grant*'s judgment in *Sloane* v. *Cadogan* (*e*).

The VICE-CHANCELLOR:—

Before I decide this case, I will read over the deeds that have been executed.

The VICE-CHANCELLOR:

30th July.

In this case an unmarried lady had a power of appointment over a fund under her mother's will, and also a power to dispose of a fund, after her death, under the will of her aunt, Mrs. *Nowell*: and, being in this country, but being about to go to *India*, she executed two instruments, one of which purported to be an execution of the power over the fund given by the mother, and the other to be an execution of the power over the fund given by Mrs. *Nowell*. After reciting that she was going to *India*, where she was engaged to be married, she executed the two powers by appointing the funds to three persons, who were to be the trustees of an indenture which professed to be her marriage settlement: and, by that indenture, after taking

(*d*) 2 Myl. & Keen, 496.
(*e*) Sugd. on Vend. 9th edition, Appx No. 26.

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notice of the fact that she was engaged to be married, but not mentioning to what person, she proceeded to declare that the trustees should hold the funds in trust for herself for her separate use for life, and, after her decease, in trust for any husband that she might happen to leave surviving her, for his life, entirely overlooking the person to whom she was engaged to be married: and then there followed trusts for the benefit of the children she might have by any husband or husbands whomsoever.

Then it appears that she went to *India*; and there she was advised that all that she had done was very absurd and ought to be revoked: and, accordingly, she executed some instrument which professed to be an instrument of revocation; and, after that, she married: and then, having married, she executed an instrument which professed to be a new settlement in favour of herself and the husband that she then had, and the children of that marriage.

The bill was filed by her and the persons who were named as trustees in the second marriage settlement, for the purpose, as I understand, of taking the funds out of those trustees in whom they had been vested under her mother's will, and under Mrs. *Nowell*'s will, and of having those funds transferred to the trustees of the second settlement. The pleadings were not handed to me, and therefore I took the effect of them from the statement made at the bar: but, upon reading over these instruments, I find that, among the recitals of the second settlement, there is a recital which, if it be true, makes the suit wholly unnecessary. That recital is that both the funds were then standing in the names of the trustees of the second settlement. Now, if that recital be true, the whole suit is superfluous. But the case

was argued before me, at the bar, as if no such circumstance had taken place: and I do not wonder, seeing the five strange instruments which this lady has executed, that the last one should have this recital in it; though it is manifestly false.—[Mr. *K. Bruce*: It is a mistake.]—The *Vice-Chancellor*: I take it to be so: but then the question is whether this lady having, in effect, before her marriage, executed the powers of appointment in the way I have mentioned, and having made that first settlement in the year 1839, which was evidently without any contract with any human being and altogether voluntary, not to say grossly absurd—the question, I say, is whether this Court can treat the whole as a nullity, and direct that the funds over which she had the powers of appointment, should, so far as circumstances will admit, be transferred to the trustees of her new settlement? There was some discussion upon it at the bar; and reference was made to the case of *Sloane* v. *Cadogan*; and it was considered that that case was an authority upon the point that there might be a voluntary settlement made, without a transfer of the fund to trustees, which this Court would not allow to be disturbed, but would consider as perfectly good against the settlor. But, upon looking into the case of *Sloane* v. *Cadogan* as it is stated at length in the Appendix to Sir *E. Sugden's* treatise on Vendors and Purchasers, it does not appear to me that, though the point was argued at the bar before Sir *William Grant*, the point, in effect, did ever arise.

The case, in substance, was this: a settlement was made upon the marriage of Lord *Cadogan*; and that settlement professed to be a declaration of the trusts of a sum of 20,000 *l.*, which was vested in trustees in some way or other (though it does not exactly appear how),

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by means of which Mr. *William Bromley Cadogan*, who was one of the sons of Lord *Cadogan*, became, subject to his father's life interest, entitled to one-fourth of that sum. Then Mr. *William Bromley Cadogan*, in the lifetime of his father and after he was married, and, apparently, without any consideration, executed an instrument by which he declared certain trusts of his one-fourth of the 20,000 *l.*; and, in particular, it is to be observed that he declared the trust, as to 1,000 *l.*, part of that one-fourth, in substance, for himself; and the rest was to go to his wife for her life, then to their children, and, in default of issue, as Mr. *Cadogan* should appoint by deed or will, and, in default of appointment, to Lord *Cadogan*. Then Mr. *Cadogan* made a will; and one of the questions that arose before Sir *W. Grant*, was whether that will was a good execution of the power contained in the voluntary settlement. By his will he gave all the residue of his estate and effects to his wife, and appointed her sole executrix. The will did not take notice of the settlement. But afterwards he executed a testamentary instrument which did take notice of the settlement, in express terms; and which, in a certain way, seems to me to have disposed of the 1,000 *l.* which was part of the fund, upon the face of this settlement, settled by him, that is, reserved to himself. After his death, the will and the testamentary paper, were proved by Mrs. *Cadogan*. Then she filed a bill, against the persons who represented Lord *Cadogan*; from which it appears that, in the meanwhile, the fund had been lent, to Lord *Cadogan*, upon mortgage: so that those who represented him had the legal interest in the fund. The bill was filed, by Mrs. *Cadogan*, insisting that she was entitled to the fund in question which was settled; because, she said, there was a good execution of the power; and, if not, then the argument was raised, at the

bar, that the settlement was altogether voluntary, and that, therefore, she, as the executrix of Mr. *Cadogan*, was entitled to have the fund. I collect, from the argument, that though that particular point was argued by Sir *Edward Sugden* and probably by the other counsel who were with him, yet the answer to it was that the bill did not raise any such case; because it stated the settlement, and claimed under the settlement. The bill was not a bill by the executrix merely, treating the matter as if there had been no settlement and leaving the Defendants to set up the settlement and avail themselves of it; but it stated, substantially, the settlement, and endeavoured to have the benefit of it; and it does not appear that relief was prayed in the alternative. So that the relief which was asked by means of the argument that the settlement ought to be altogether considered as a nullity, was, in effect, inconsistent with the case made by the bill. And it further struck me, on reading the case, that, though it might have been possible that Mr. *Cadogan*, in his own lifetime, might, notwithstanding the settlement, have requested that the holders of the fund should be declared trustees for him; yet the case varied from the mere case of a claim by Mr. *Cadogan*, in this respect, that Mr. *Cadogan* had died, and, by his testamentary papers, which were proved by the executrix and had bound her, he had taken notice of the settlement as an existing instrument; and it occurred to me, therefore, though it does not appear to have been noticed by Sir *William Grant*, that the decision of that learned Judge might have been supported upon that ground: because the party who claimed to set aside the settlement, was the personal representative of a party who, by his testamentary papers, had acknowledged the settlement.

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The language that is put into the mouth of Sir *William Grant*, is this: he says: "But, as against the party himself and his representatives, a voluntary settlement is binding." That is true, provided that the subject of the settlement is completely vested in those persons who are to take under it, or in certain persons as trustees, who are to hold it for other parties. His *Honor* then goes on to say: "The Court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer." That is true. "Here the fund was vested in trustees." That is true with respect to the original fund itself. "Mr. *William Cadogan* had an equitable reversionary interest in that fund, and he has assigned it to certain trustees, and then the first trustees are trustees for his assigns, and they may come here; for, when the trust is created, no consideration is essential, and the Court will execute it, though voluntary."

Now I cannot but think, if Sir *William Grant* did use that language, that it was inaccurate; because the voluntary settlement which was executed by Mr. *William Cadogan*, left the fund as it existed at the time when the settlement was made; and nothing whatever passed, by the voluntary settlement, to the persons who were named as trustees of it: and it seems to me that, but for the other circumstances which I have noticed, his *Honor's* decision would not have been right. But, attending to what actually was the state of the record before him, and what were the circumstances of the case, it appears to me that the decision was perfectly right. Therefore the only thing that I should consider as inaccurate, is the expression that Mr. *Cadogan* had assigned the fund to certain trustees; whereas, in effect, he assigned

nothing; for they took nothing; the fund remained just where it was.

I do not, therefore, consider that *Sloane* v. *Cadogan* is, in effect, any sort of authority for the position in support of which it was cited. And I observe that my *Lord Chancellor*, in giving his judgment upon the appeal in *Edwards* v. *Jones*, says (*a*): "In *Sloane* v. *Cadogan* the claim was not against the donor or his representatives, for the purpose of making that complete which had been left imperfect; but against the persons who had the legal custody of the fund; and the question was whether the transaction constituted them trustees of the fund for the *cestui que trusts*. Sir *William Grant* came to the conclusion that it did; and the consequence was that they were bound to account. That case has been considered, by Sir *Edward Sugden*, as going a great way; but, upon the principle stated by Sir *William Grant*, it is free from all possible question; for there was no attempt, in that case, to call in aid the jurisdiction of this Court."

It is true that, upon the principle stated by Sir *William Grant*, it was right. The only question is whether the mere principle, as it stands expressed in the judgment, independent of the facts of the case, was a principle that could be correctly applied to the case; and I rather think that it was not. Taking the principle to be right, the decision certainly is right.

In this present case it appears to me that the lady, having made what I should call an imperfect voluntary settlement, without any contract whatever with any

(*a*) 1 Myl. & Cr. 238.

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human being, was at perfect liberty to call upon those who were the holders of the fund and say: "I have executed my powers of appointment, but all the trusts I have declared are clearly void: I choose to annul them." And I cannot but think, inasmuch as the funds have not (which I take to be the fact notwithstanding the recital in the last indenture) passed from the persons who were the holders of the funds under the will of the mother and under the will of Mrs. *Nowell*, that those persons do now hold the funds in trust for such purposes as Mrs. *Beatson* may now choose to declare. Therefore when she has filed a bill in conjunction with those gentlemen who are named as trustees of her second settlement, making the husband a party to the record, and he does not object to the relief asked by the bill, this Court ought to interfere and ought to do this, namely, not to direct that both the sets of trustees shall hand over the funds to the new trustees; but that the trustees of the mother's will shall hand over the fund to the new trustees; because the fund is given, by the mother's will, absolutely according to the appointment of Mrs. *Beatson*; but as, with respect to the fund which is given by the will of Mrs. *Nowell*, the first trust declared is that it shall be in trust for the separate use of Mrs. *Beatson* during her life, and the trustees are to transfer the fund, after her decease, in such manner as she shall appoint; it appears to me that it would be inconsistent with the trusts declared by the will of Mrs. *Nowell*, that the trustees should, in the first instance, part with the fund. My opinion is that, according to the true construction of their trusts, they must hold that fund during the life of Mrs. *Beatson*, unless they choose to give it up; and no duty can be imposed upon them to transfer the fund at all until after her death.

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Therefore I think that those persons who are trustees under the mother's will, should be directed to transfer the fund to the nominees of Mrs. *Beatson* under her last instrument; and that it should be declared that the trustees under Mrs. *Nowell*'s will do, as to the two-sevenths of her residuary estate to which Mrs. *Beatson* is entitled, stand possessed of them in trust for her separate use during her life, and, after her death, upon trust to assign them to the trustees of Mrs. *Beatson*'s second settlement.

Declare that, in the events which have happened, the deeds poll of appointment and the indenture of settlement of the 13th of June 1839, have become inoperative, and that the indenture of revocation and new appointment of the 30th of December 1839 and the indenture of settlement of the 12th of August 1840, ought to be carried into effect: Order the trustees of Mrs. *Nowell*'s will to transfer the two-sevenths of her residuary estate, and the trustees of Mrs. *Humfrays*'s will to transfer the 5,000 *l.* reduced annuities, to the trustees of the indentures of the 12th of August 1840*.

[Reg. Lib. (A.) 1840, fo. 1451 b.

* As the decree directed the trustees of Mrs. *Nowell*'s will to transfer the two-sevenths of that testatrix's residuary estate, to the trustees of the deed of August 1840, it is presumed that they had consented to make the transfer.

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31st July.

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Administration. Priority. Devisee and legatee.

Specific legacies are to be applied in payment of specialty debts, in priority to real estates devised.

[*Long* v. *Short* observed upon.

BY indentures of lease and release of September, 1815, real estates were settled and assured to Sir *G. Cornewall* for life, with remainder to his first and other sons in tail male. By indentures of lease and release of July 1816, other real estates were conveyed and assured to trustees, upon trust to raise, thereout, by sale, mortgage or otherwise, monies sufficient to defray certain scheduled charges and incumbrances, and, subject thereto, to the use of Sir *G. Cornewall* in fee.

Sir *G. Cornewall*, by his will dated in November 1818, devised all the estates comprised in the last-mentioned indentures, to such and the same uses as the estates comprised in the first-mentioned indentures should stand settled and assured to at the time of his decease; and, as to all his personal estate and effects whatsoever which should remain after payment of his just debts (exclusive of the debts specially charged on his real estates) and his funeral expenses, he gave the same to his wife and appointed her sole executrix.

By a codicil of March 1835, the testator gave, to his eldest son, all his plate and family jewels and trinkets and ornaments of the person, and all his furniture and other articles of domestic use and ornament.

By a second codicil, the testator bequeathed several articles specifically to his wife.

* *Ex relatione* Mr. Nicholl.

By a third codicil, the testator devised certain tithes to trustees, in trust to sell and divide the proceeds thereof amongst his younger children.

The testator died in 1835, and thereupon certain real estates of which he was seised in fee, and which were not comprised in either of the above-mentioned indentures, descended to his eldest son. The testator left several younger children.

The bill was filed, by the younger children of the testator, for the administration of his estate, against the heir at law, the widow the executrix, and the trustees of the indentures of 1815 and 1816.

On the hearing for further directions, a question arose whether the personalty specifically bequeathed to the widow by the second codicil and to the eldest son by the first codicil, ought to contribute, rateably with the devised real estates, to the payment of such of the testator's specialty debts as the general personal estate and the real estates descended, had proved insufficient to pay, or whether the specific legacies must not be resorted to and exhausted before any application of the devised real estates.

Mr. *Griffith Richards* and Mr. *Freeling* for the Plaintiffs, and Mr. *Jacob* and Mr. *De Gex* for the eldest son and heir-at-law*, in support of the proposition that the specific legacies must be first applied:

Prior to the statute of fraudulent devises (3 & 4 Will.

* It was considered most for the benefit of the heir as tenant in tail of the devised real estates, that the debts should be defrayed out of the specific legacies, though his specific legacies were of considerable value.

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& Mary, c. 14), a specialty creditor could in no case have come against devised real estates, but must have resorted to the specific legacies. That statute was passed for the benefit of creditors, not of legatees. *Galton* v. *Hancock* (*a*). The fifth resolution in *Haslewood* v. *Pope* (*b*) is an express decision in favour of the proposition we are contending for. *Clifton* v. *Burt* (*c*) shows that a specific devisee is more favoured in equity than a specific legatee is. The case of a widow's *paraphernalia*, furnishes a very strong argument in support of the same doctrine; for it has been repeatedly held that a widow, whose paraphernalia have been taken by a specialty creditor, has no equity to come upon devised realty for a contribution. *Ridout* v. *Lord Plymouth* (*d*); *Probert* v. *Clifford* (*e*); *Tipping* v. *Tipping* (*f*); *Graham* v. *Lord Londonderry* (*g*). The case of *Snelson* v. *Corbet* (*h*) shows that *paraphernalia* are to be preferred to specific legacies. The principle of a Court of Equity has always been to exhaust the personalty before resorting to realty, in payment of debts.

Mr. *Nicholl*, for the testator's widow:

This point has been decided by *Long* v. *Short* (*i*) and *Silk* v. *Prime* (*k*). In both those cases it was held that, to pay specialty debts, specific legacies and specifically devised realty were to contribute rateably. *O Neal* v. *Mead* (*l*) and *Irvin* v. *Ironmonger* (*m*) are to the same effect. *Haslewood* v. *Pope* does seem at first sight

(*a*) 2 Atk. 430.
(*b*) 3 P. Will. 322.
(*c*) 1 P. Will. 679.
(*d*) 2 Atk. 104.
(*e*) Amb. 6; 2 P. Will. 544, note.
(*f*) 1 P. Will. 729.
(*g*) 3 Atk. 393.
(*h*) 3 Atk. 369.
(*i*) 1 P. Will. 403; 2 Vern. 756.
(*k*) 1 Dick. 384; 1 Bro. C. C. 138, note.
(*l*) 1 P. Will. 693.
(*m*) 2 R. Myl. 531.

opposed to *Long* v. *Short*; but Mr. *Roper*, in his Treatise on Legacies (Vol. 1, p. 829), thus reconciles the two decisions. He says: "It is presumed that Lord *Talbot* (in *Haslewood* v. *Pope*), in the expression, '*the specific legatee shall not stand in the place of the bond creditors to charge the land devised*,' must have intended, not that the devisee should not contribute, but that the specific legatee had no right to have the assets so marshalled against the specific devisee, as to throw the bond debt, exclusively, upon the real estate devised, to the exoneration of the personalty specifically bequeathed." The decision in *Haslewood* v. *Pope* may be thus further explained. It had been established, long anterior to that decision, that a mere pecuniary and, *à fortiori*, a specific legatee could marshal assets against a descended estate: the fourth resolution in that case carried the doctrine a step further, and Lord *Talbot* then held that it was equally a case for marshalling where the estate was devised subject to payment of debts. By the fifth resolution in that case, it would seem that an attempt was made to extend further the rule just established by the fourth resolution, and to throw the *whole* of the specialty debt on the devised realty, to the entire, and not simply *pro ratâ* exoneration of the specific legacy: this Lord *Talbot* refused to do. But had Lord *Talbot* been asked whether he intended, by such refusal, to decide that the specific legacy was to bear the *whole* of the debt, the answer would have been that *Long* v. *Short* had already established that the debt must be borne, rateably and *pari passu*, by both subjects of gift. *Clifton* v. *Burt* is the case of a mere pecuniary legatee, and furnishes no authority either way. To derive any argument from the case of *paraphernalia*, it must be shown that the proposition that *paraphernalia* stand in a preferable situation to

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specific legacies, is universally true; but *Burton* v. *Pierpoint* (*n*) is an express authority that it is not so. *Probert* v. *Clifford* is opposed by *Boyntun* v. *Boyntun* (*m*). *Snelson* v. *Corbet* by no means bears out the proposition attempted to be derived from it. With regard to the argument of *principle* in the application of assets, how does that principle exist, when descended real estates are applied before specifically bequeathed personalty?

Mr. *Richards*, in reply:

If the authorities are conflicting, resort must be had to principle. There can be no question on which side the preponderance of principle is to be found.

The VICE-CHANCELLOR:

I have my own copy of *Peere Williams*'s Reports in Court, and I see that, many years ago, I had my attention called to the conflicting decisions on this point; and I find that, in my copy, I have added this note to the case of *Long* v. *Short*: "*Quære* however, if the statute against fraudulent devises was not made for the benefit of creditors and not of legatees." Then I see I have made a reference to *Galton* v. *Hancock*. I must say that the weight of authority has always appeared to me to be in favour of the decision of Lord *Talbot*. I have always heard Lord *Talbot* spoken of as an excellent lawyer, conversant with the law of the court in which he sat. Lord *Eldon* has frequently expressed that opinion of him: added to this, his is the later decision, and is entirely supported by principle. If I find two decisions, one of one Lord Chancellor and another of another Lord Chancellor, and the second of the two decisions is quite consonant to principle, I think

(*n*) 2 P. Will. 78. (*o*) 1 Cox, 106.

the later decision must be the one to stand. I have therefore no difficulty in holding that the specific legacies must be exhausted before the real estates are resorted to.

Will. Construction. Books.

Testator gave, to his son, all his plate, jewels, trinkets, and all his furniture and other *articles of domestic use and ornament.* By a codicil, he gave, to his wife, all his provisions, wines, carriages, horses, and all his musical instruments, and *the use of all his books*, and all his money in his dwelling-house and in his banker's and land-steward's hands, for her own sole use and benefit. Held that the books were given to the son absolutely; subject to a life-interest in the wife.

The other questions in the cause, were whether the testator's books passed, to his eldest son, by the first codicil; and whether his widow took more than a life-interest in them under the second codicil.

Under the will, the widow was residuary legatee of the testator's personal estate. By the first codicil, the testator's plate, family jewels and trinkets and ornaments of the person, furniture *and all his other articles of domestic use or ornament*, were given to his eldest son. By the second codicil, the testator gave, to his wife, all the provisions and wines in his dwelling-house, and all his pleasure-carriages and horses, musical instruments *and the use of all his books*, and all the money in his dwelling-house, in his banker's and land-steward's hands at the time of his decease, for her own sole use and benefit.

The VICE-CHANCELLOR:

The testator must be taken to have known that, by his will, he had given his general personal estate to his wife. By his first codicil, he gives, to his eldest son, all his plate, family jewels, trinkets and ornaments of the person, and all his furniture and other articles of domestic use or ornament. By the second codicil, he gives, to his wife, all the provisions and wines in his dwelling-house &c. and *the use* of all his books &c. &c. Now books, if they are used, are articles of domestic use: if they are not used, they are articles of domestic ornament. Consequently they are included in the

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bequest made, to the eldest son, by the first codicil [redacted] With respect to the second codicil, it is observable tha[redacted] the testator gives, to his wife, all his provisions, wines [redacted] carriages, horses and musical instruments; but, whe[redacted] he mentions his books, he changes the form of expres[redacted] sion; for he does not give to her, all his books, but, *th*[redacted] *use* of all his books. Therefore, the true construction [redacted] of the two codicils, is that the son takes the book[redacted] absolutely, subject only to the wife's right to the us[redacted] of them during her life.

1841: 30th and 31st July.

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LOMBE *v.* JODRELL.

Accumulation. Thellusson Act (39 & 40 *Geo.* 3, c. 98).

SIR *John Lombe* bart., by his will dated the 18th day of November 1814, devised all his manors, lands &c. situate in *Norfolk* or elsewhere, whether freehold,

Testator, after devising his estates in strict settlement, directed that, in case he should not erect a mansion-house on his estates in his lifetime, his trustees should, *forthwith after his death*, erect the same according to such plan as he should approve of in his lifetime; or, if he should die before such plan should be prepared and completed, then according to such plan as his trustees, with the consent of the person, for the time being beneficially entitled to the immediate freehold of his estates, should think proper to adopt: and he gave 20,000 *l.* to the trustees, to be applied in erecting the House, and, *in the meantime*, to be laid out in the funds *and the dividends to be accumulated*, and the accumulations, as well as the original fund, to be applied in erecting the house, and the surplus (if any) to be laid out in the purchase of lands to be settled to the same uses as the devised estates. Owing to opposition on the part of the tenant for life, the trustees did not build the house until more than twenty-one years after the testator's death; and they invested the 20,000 *l.* and accumulated the income of it during the whole of the interval. Held that the direction for accumulation was not within the *Thellusson* Act, but that the whole of the accumulated fund was applicable to purposes directed by the will.

copyhold or leasehold, unto and to the use of the Defendants *Stoughton* and *Mitchell*, their heirs, executors &c. upon trust to raise, out of the rents, during the term of ten years from his decease, an annual sum of 1,000 *l.*, and to apply the same upon the trusts thereinafter declared; and he directed that, subject to the raising of that sum, the trustees should stand seised and possessed of the manors &c. in trust for the Defendant, *Edward Lombe* the elder, for life, and, after his death, in trust for his eldest son, the Plaintiff *Edward Lombe* the younger, for his life, and, after his death, in trust for his first and other sons successively in tail male, with remainder in trust for the second and other sons of *Edward Lombe* the elder, who should be born in the testator's lifetime, successively for their lives, with remainder in trust for their first and other sons successively in tail male, with remainder in trust for the sons of *Edward Lombe* the elder, who should be born after the testator's death, successively in tail male, with remainders in trust for several other persons for their lives successively, and their first and other sons in tail male, with the ultimate remainder in trust for the testator's great niece, *Lucy Marsham*, in fee. In a subsequent part of the will, the following clause was contained: "And whereas it is my wish and intention that a mansion-house and suitable offices, fit for the residence of the owner of my estate, shall be erected on some convenient spot in the parish of *Bylaugh*, in the county of *Norfolk*, either in my lifetime or after my death, and that, if I shall not erect the same in my lifetime, then that my said trustees shall, *forthwith after my death*, erect the same according to such plan as I shall, in my lifetime, approve of, or, if I shall die before such plan shall be prepared and completed, then according to such plan as the trustees or trustee for the time being under this

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my will, with the consent of the person for the time being beneficially entitled to the immediate freehold of my said manors &c. under this my will, shall think proper to adopt, adhering as closely as possible (situation and other incidental circumstances being considered) to the plan of the house now the residence of *Robert Marsham* esquire, at *Stratton Strawless* in the said county of *Norfolk*: Now, therefore, in order to provide a fund for the erection of the said mansion-house and offices after my death, in case I shall not erect the same in my lifetime, I give and bequeath, unto the said *James Stoughton* and *John Mitchell*, their executors &c. in the event of my not erecting or completing the erection of the said mansion-house in my lifetime, the sum of 20,000 *l.* sterling money, to the intent to be applied for the purposes aforesaid, and, in the meantime, to be laid out by them, in their names, in the purchase of stock in some or one of the public stocks or funds of *Great Britain*, or at interest on real security; and also that my said trustees shall, from time to time, receive the interest &c. of the said stocks, funds and securities, and lay out such interest &c. in the purchase of other stocks or funds as aforesaid, so as for the annual income and produce of the said stocks or funds to accumulate, in the nature of compound interest, until the said money shall be wanted for the purpose hereinbefore and also hereinafter mentioned: and I also further declare and direct that my said trustees or trustee for the time being, shall and do stand possessed of the said annual sum of 1,000 *l.*, hereinbefore directed to be received and retained by them by and out of the rents and profits of my said manors &c. for the said term of ten years next after my decease, upon trust that they or he do and shall add the said annual sum of 1,000 *l.*, from time to time to be raised as aforesaid, to the said sum

of 20,000 *l.* hereinbefore bequeathed for the purpose aforesaid, to the intent to be holden upon the same trusts and to accumulate therewith, and to become, in all respects, as part thereof: And I do hereby expressly direct that my said trustees shall, forthwith after my death, in case I shall not erect or complete the said mansion-house and offices in my lifetime, commence and proceed with the erection thereof in the manner hereinbefore expressed, and apply the said sum of 20,000 *l.* so bequeathed as aforesaid and the accumulations thereof, and also the said annual sum of 1,000 *l.* to be from time to time raised as aforesaid and the accumulations thereof respectively, in defraying the expenses of erecting the said mansion-house and offices in the manner aforesaid: And I do hereby declare and direct that if, after the erection and completion of the said mansion-house and offices, any part of the said sum of 20,000 *l.* or the accumulations thereof, or of the said annual sum of 1,000 *l.* to be raised and received as aforesaid, or of the accumulations thereof, shall remain unapplied and not be wanted for such purpose, then that my said trustees shall stand possessed thereof upon the like trusts as are herein declared concerning the residue of my personal estate hereinafter bequeathed." The testator then empowered his trustees to take, from his estates, timber, brick-earth and any other materials which might be wanted for erecting the mansion-house and offices, or for repairing any of the buildings on his estates: and he gave his residuary personal estate to the trustees, in trust to invest it in the purchase of lands to be settled to the same uses as the devised estates; and, until such purchase should be made, to invest it in the funds, and pay the dividends to such person or persons as should, by virtue of his will, be

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entitled to the rents of the lands directed to be purchased; and he appointed *Edward Lombe* the elder and *Mitchell*, executors of his will.

The testator died on the 27th of May 1817, without having built or approved of any plan for building the mansion-house and offices at *Bylaugh*; and, after his death, his executors laid out 20,000 *l.*, part of his personal estate, upon securities, in the names of *Stoughton* and *Mitchell*, to be applied for the purpose of erecting such mansion-house and offices; and *Stoughton* and *Mitchell* from time to time laid out the income of that sum and the annual sum of 1,000 *l.*, out of the rents of the devised estates, to accumulate for the last-mentioned purpose. They also caused a plan of the mansion-house and offices to be prepared by an architect: but *Edward Lombe*, the elder, objected to their being erected at *Bylaugh*, and declared his intention not to inhabit them if they should be erected, but to remain in the mansion-house then on the estates; and, consequently, he did not give his consent to the plan which had been prepared. The Plaintiff, however, was desirous that a mansion-house and offices should forthwith be erected at *Bylaugh*: and accordingly (on the 21st of April 1828) he filed his bill, praying that *Stoughton* and *Mitchell* might be ordered to transfer the building fund, then standing in their names, into Court, and that, by means thereof, a mansion-house and offices might be forthwith, or at some other convenient time, erected at *Bylaugh*, pursuant to the directions of the will and under the decree of the Court; and that so much of the building fund as should not be wanted for the purpose aforesaid, might be laid out according to the directions of the will in that behalf.

By an order in the cause, dated in July 1828, *Stoughton* and *Mitchell* were ordered to transfer, into Court, the sum of 43,548*l.* 18*s.* 1*d.*, which was admitted by them to be invested in their names on account of the building-fund; and it was ordered that the dividends to accrue due on that sum and on all accumulations thereon, should be laid out in consols. *Stoughton* and *Mitchell* accordingly transferred the 43,548*l.* 18*s.* 1*d.* into Court. In February 1829, the suit was heard, and the Court then ordered that *Stoughton* and *Mitchell* should not commence or proceed with the erection of the mansion-house and offices at *Bylaugh*, until the further order of the Court.

In September 1839, the Plaintiff filed a bill of supplement, to which the testator's co-heirs at law, customary heirs and next of kin, as well as *Stoughton* and *Mitchell* and *Edward Lombe* the elder, were made defendants, stating (amongst other things) that the period of 21 years from the testator's death, expired on the 27th of May 1838; and that *Edward Lombe* the elder insisted that no accumulation of the building fund could take place beyond that period, and claimed the accumulations from that time. The supplemental bill prayed that the trusts of the will might be performed under the direction of the Court; that the rights and interests of all parties who, in the opinion of the Court, were interested in the building fund (which then amounted to 63,507*l.* 14*s.* 11*d.* consols) and the dividends thereof, or in any part thereof, might be ascertained and declared; that a mansion-house and offices might be forthwith erected at *Bylaugh* under the direction of the Court; and that a competent part of the fund might be applied for that purpose, and that the

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remainder of it might be laid out pursuant to the directions of the will in that behalf.

By the decree made on the hearing of the supplemental cause, it was ordered (amongst other things) that *Mitchell* (who had survived his co-trustee *Stoughton*) should continue to search for and dig sufficient quantities of brick-earth, sand and materials in and upon the testator's estates, and to make sufficient quantities of bricks, with a view to building a mansion-house and offices at *Bylaugh*; and that, at the proper season of the year, he should mark timber upon the estates, fit to be felled and used in erecting the mansion-house and offices.

On the original and supplemental causes coming on to be heard for further directions, the question was whether the trust or direction, in the will, for accumulating the building fund, came within the Thellusson Act (39th & 40th Geo. 3, c. 98). That Act enacts: "that no person or persons shall, after the passing of that Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof, shall be wholly or partially accumulated for any longer term than for the life or lives of any such grantor or grantors, settlor or settlors, or the term of 21 years from the death of any such grantor, settlor, devisor or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisor or testator, or during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, surrender, will or other assurances

irecting such accumulations, would, for the time being, f of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce o directed to be accumulated: and, in every case where ny accumulation shall be directed otherwise than as foresaid, such direction shall be null and void; and the rents, issues, profits and produce of such property o directed to be accumulated, shall, so long as the ame shall be directed to accumulate contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Mr. *Jacob* and Mr. *Messiter*, for the Plaintiffs, and Mr. *Boteler* and Mr. *Elmsley* for Defendants in the same interest, said that, in order to bring the case within the operation of the Thellusson Act, it must be shown that the will contained a positive direction to accumulate the building-fund which was contrary to the provisions of the Act: but the will did not direct the fund to be accumulated beyond the time allowed by the Act, or indeed, for any definite period whatever: on the contrary, it directed the house &c. to be erected *forthwith* after the testator's death: and that the accumulation which had taken place, was owing, not to any direction in the will, but to the act of the Court, and to the refusal of the first tenant for life to consent to the plan which had been prepared*.

* The *Vice-Chancellor* made the following observations in the course of the argument:

With respect to the accumulation, it is said that there is no direction to accumulate beyond the time allowed by the Act. But there are nine tenants for life. Suppose that the trustees had proposed a plan to the first tenant for life; and, whilst it was under his consideration, he had become

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Mr. *Bethell*, Mr. *Lovat*, Mr. *Parry*, Mr. *Romilly*, Mr. *Collyer*, Mr. *Steere* and Mr. *Glasse* appeared for the other parties. They cited *Lord Southampton* v. *The Marquis of Hertford* (*a*); *Piper* v. *Piper* (*b*); *Sitwell* v. *Bernard* (*c*); *Webb* v. *Webb* (*d*); *Gravenor* v. *Hallum* (*e*); *Tregonwell* v. *Sydenham* (*f*); *Griffiths* v. *Vere* (*g*).

The VICE-CHANCELLOR:

31st July.

The real question in this case, is whether the testator has directed that, at all events, a house shall be built: that is the sole point as I understand it.

lunatic; and, before any commission had been taken out, he had died: that might occupy a year: and then the next tenant for life would come into possession; and then a similar thing might happen; and so it might go on; and the last tenant for life might die leaving fifteen or sixteen sons, who are to take in succession; and the same event might happen to each in succession: so that twenty-five or twenty-six years might pass, before there was any method by which a plan could be adopted. Is there to be no accumulation during that time? I must say that it appears to me, on the plain words of this will, that an accumulation is directed in the intermediate time. Here the testator has, in terms, directed an accumulation, though I admit not for a definite time. He has expressly directed an accumulation; and he has so constituted the terms under which the house is to be built, that this accumulation might go on for an indefinite time. I cannot but think, where he has directed an accumulation to be made, and circumstances might be such as to prolong the accumulation beyond 21 years, there the Act would step in, and say it should not go beyond the 21 years.

(*a*) 2 V. & B. 54.
(*b*) 3 Myl. & Keen, 159.
(*c*) 6 Ves. 520.
(*d*) 2 Bev. 493.
(*e*) Amb. 643.
(*f*) 3 Dow, P. C. 194.
(*g*) 9 Ves. 127.

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The testator commences his will, by devising all his freehold, leasehold and copyhold tenements to the Rev. *James Stoughton* and Mr. *John Mitchell* in fee, as far as the freeholds and copyholds are concerned. Then he, first of all, directs that, for ten years after his death, they shall take, yearly, a sum of 1,000*l.* out of the rents; and then he proceeds to limit the trusts, which create estates for life, in succession, with remainders to the first and other sons, of all the tenants for life, except the first. Then, having exhausted the limitations, he says: "And whereas it is my wish and intention that a mansion-house and suitable offices fit for the residence of the owner of my estate, shall be erected in some convenient spot in the parish of *Bylaugh*, in the county of *Norfolk*, either in my lifetime or after my death; and that, if I shall not erect the same in my lifetime, then my trustees shall, forthwith after my death, erect the same, according to such plan as I shall, in my lifetime, approve of; or, if I shall die before such plan shall be prepared and completed, then according to such plan as the trustees or trustee for the time being under this my will, with the consent of the person for the time being beneficially entitled to the immediate freehold of my said manors &c., under this my will, shall think proper to adopt, adhering, as closely as possible, situation and other incidental circumstances being considered, to the plan of the house now the residence of *Robert Marsham*, esq., at *Stratton Strawless*, in the said county of *Norfolk*: Now, therefore, in order to provide a fund for the erection of the said mansion-house and offices after my death, in case I shall not erect the same in my lifetime, I give and bequeath, unto the said *James Stoughton* and *John Mitchell*, their executors, administrators and assigns, in the event of my not erecting or completing the

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erection of the said mansion-house in my lifetime, the sum of 20,000*l.*, to the intent to be applied for the purposes aforesaid; and, in the meantime, to be laid out, by them, in their names, in the purchase of stock, in some or one of the public stocks or funds: * * * And I also further declare and direct that my said trustees or trustee for the time being, shall and do stand possessed of the said annual sum of 1,000*l.*, hereinbefore directed to be received and retained by them out of the rents and profits of my said manors, messuages, lands and hereditaments for the said term of ten years next after my decease, upon trust that they or he do and shall add the said annual sum of 1,000*l.*, from time to time to be raised as aforesaid, to the said sum of 20,000*l.* hereinbefore bequeathed for the purpose aforesaid, to the intent to be holden upon the same trusts, and to accumulate therewith, and to become, in all respects, as part thereof: and I do hereby expressly direct that my said trustees shall, forthwith after my death, in case I shall not erect or complete the mansion-house and offices in my lifetime, commence and proceed with the erection thereof in the manner hereinbefore expressed, and apply the said sum of 20,000*l.*, so bequeathed as aforesaid, and the accumulations thereof, and also the said annual sum of 1,000*l.* to be, from time to time, raised as aforesaid, and the accumulations thereof respectively, in defraying the expenses of erecting the said mansion-house and offices in the manner aforesaid." Then he makes the disposition of the surplus of the fund which may remain after the erection of the house.

It appears to me to be impossible to read this passage in the will, without seeing that there is, in the plainest language, an express trust for the erection of the mansion-house, which the trustees are, forthwith

after his death, to commence and to proceed with the erecting of. I cannot conceive any words more plain.

Then the question subordinately arises, whether, inasmuch as the testator has directed that the trustees shall build the house, according to a plan to be approved of by them with the consent, not of a given individual, but of that accidental personage who may, according to various circumstances, be either an adult or an infant, that is, the person entitled to the immediate freehold of the manors &c.—whether that is to have the effect of preventing what is the express, clear, declared intent from being carried into execution.

Now I cannot but think that, if the Court had been called upon to deal with the case at the request of any one of the parties interested in the estate—if the Court had been called upon to say: "Let the house be built," and had found, either from incapacity arising from the infancy of a tenant in tail, from the absence abroad of the tenant for life in possession, who was adult, or from his perverseness, or from his loss of understanding, or from any other cause, the plan could not be approved of in the manner in which the testator had directed it to be approved of, the Court would have interfered, and said that the trustees should not stop merely because there was the obstacle to the approbation of the plan; and would have taken care that there should be a proper plan, and would have referred it, to the *Master*, as a matter of course, to approve of a plan according to the directions of the will.

If that is the true construction of the will, there is an end to all the other questions: because I consider all those directions which the testator has given about the

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accumulation of the fund until it is actually applied are so much surplusage, and are, in effect, consequences which would necessarily have resulted from the direction that, in the first place, there should be sequestered, from the general personal estate, the sum of 20,000*l.*, and, from the rents of the real estate, the yearly sum of 1,000*l.* It would have been the duty of the trustees, when they had any extra sum lying idle, to invest it, and to take care that it should accumulate. And the mere circumstance that the testator has inserted, in his will, a direction to prevent the accidental waste of his property during the time which necessarily would be occupied in the building of the house, appears to me to be merely an incident to the creation of the fund for that purpose, which must occupy some considerable time.

For these reasons I do not think that this is an accumulation within the meaning of the Thellusson Act: and if, by reason of disputes, negligence or inadvertence, the fund had been paid into this Court and gone on accumulating to the end of a century, my opinion is, that the matter would have remained just exactly as it was before, namely, that, out of the accumulated fund, whenever the Court came to operate upon it, the house would be directed to be built according to the declared trust; and that the Court would have dealt with the surplus of the fund, according to the trust declared of that surplus. Consequently neither the heir at law, nor the next of kin of the testator have any interest, whatever, in the subject.

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1841: 29th July and 2d August.

Will. Construction. Next of Kin.

By a marriage settlement, a fund was settled on the wife, if she should survive her husband, for her life, remainder to their children who, being sons, should attain twenty-one, or being daughters, should attain that age or marry; and the trustees were directed to apply a portion of the income of the children's expectant shares, for their maintenance, and to accumulate the surplus for the benefit of such person or persons as should be entitled thereto, by virtue of the settlement: provided that, if no son should attain twenty-one, nor any daughter should attain that age or marry, then the fund should be in trust for such person or persons as the husband should, by deed or will, appoint; and, in default of appointment, in trust for *his next of kin, according to the Statute of Distributions, and as if he had died intestate.* There was issue of the marriage one son only. The husband died first, without having exercised the power reserved to him: then the son died under twenty-one; and, lastly, the wife died. Held that the fund vested in the son, as his father's next of kin at the father's death, and not in the persons who were the father's next of kin at the son's death.

ALEXANDER FALCONER, of *Calcutta*, by the settlement on his marriage with *Josephine Hume*, dated the 25th of February 1825, after reciting that, on the treaty for the marriage, it was agreed that 80,000 sicca rupees, the amount of certain insurances on his life, should be settled, by him, *for the benefit of Josephine Hume and the issue of the marriage*, assigned the monies to be received under the policies, to the trustees of the settlement, in trust for *Josephine Hume*, if she should survive him, for her separate use, for her life, and, after her decease, in trust for the child or children of the marriage who, being a son or sons, should attain twenty-one, or, being a daughter or daughters, should attain that age or marry under it: provided that, after the decease of *Josephine Hume* and until the shares of the children should become payable, the trustees should apply, such part of the interest of the trust-funds as therein mentioned, for the maintenance and education of such child or children, in such proportions as the

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trustees should think fit; and should permit the residue of the interest of the share or shares of such children or child, to accumulate *for the benefit of such person or persons as should be entitled thereto by virtue of the settlement*: provided that it should be lawful for the trustees, at any time or times after the death of *Josephine Hume*, to pay any part of the share or shares of any such child or children, being a son or sons, for placing him or them in any trade or profession, or for his or their advancement in the world, notwithstanding he or they should not then have attained twenty-one: provided that, *in case there should be no child of the marriage, or, there being such, every son should die under twenty-one, and every daughter under that age and unmarried*, then the trustees should stand possessed of the trust-fund, or the residue thereof, and the accumulated interest and proceeds thereof, *in trust for such person and persons*, and to and for such uses, intents and purposes, and in such manner as *Alexander Falconer*, by deed or by his will, *should appoint*; and, in default of such appointment, *in trust for his next of kin according to the statute for the distribution of intestates' estates, and as if he had died intestate.*

Alexander Falconer died in July 1826, intestate, leaving *Josephine* his wife and a son named *Alexander Freer Falconer*, who was the only issue of their marriage, him surviving. *Alexander Freer Falconer* died in October 1827, and letters of administration to his estate were granted to the Plaintiff. In the same year *Josephine Falconer* married the Plaintiff. On the 29th of April 1839 she died, and letters of administration to her estate were granted to the Plaintiff.

The bill, after stating as above, alleged that *Alexander Falconer* never exercised the power of appointment

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given to him, by the settlement, in the event of there being no child of the marriage, or, there being such, every son should die under twenty-one, and every daughter under that age and unmarried; which event took place upon the death of *Alexander Freer Falconer*, the only child of the marriage, under the age of twenty-one years; that *Alexander Freer Falconer* was the sole next of kin of *Alexander Falconer* living at the death of the latter; that the Plaintiff, as administrator to his wife, claimed the dividends of the trust-fund accrued during her life and remaining unpaid; and that, as administrator to *Alexander Freer Falconer*, he claimed to be entitled to the *corpus* of that fund; that *Alexander Falconer* had a brother and six sisters living at his death, who would have been his next of kin if *A. F. Falconer* had died in his lifetime, and the said brother and sisters were living at the time of *A. F. Falconer*'s death, and were the sole next of kin of *A. Falconer* living at the last-mentioned time; but the brother and two of the sisters had since died; that administration to the estate of *Alexander Falconer*, had been granted to *Alexander Rogers*, who was a creditor of *Alexander Falconer* at the time of his death, and, in that capacity, he procured the letters of administration to be granted to him; and that he claimed, as such administrator, to have the *corpus* of the trust-fund and all the dividends accrued thereon since the death of *Josepine Smith*, paid over to him for the purpose of being applied in payment of *A. Falconer*'s debt; that, in consequence of the said conflicting claims, the trustees of the fund (who, together with the surviving sisters and the personal representatives of the deceased brother and sisters of *A. Falconer*, and *A. Rogers*, were the Defendants to the bill) were unable to administer the trust-fund without the direction of the Court.

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The bill prayed that the rights and interests of all parties in the trust-fund might be ascertained, and that the same might be paid over and transferred to the persons entitled, according to their respective rights.

A. Rogers, in his answer, said that *Alexander Falconer* was indebted to various individuals at the time when he executed the settlement, and that some of the debts which he then owed, were still unsatisfied: and he submitted that the settlement, except so far as it was a provision for *A. Falconer* and *Josephine* his wife and the issue of their marriage, was voluntary and void as against *A. Falconer*'s creditors; and that such creditors were entitled to be paid their debts out of the *corpus* of the trust-fund, before any person, other than *A. Falconer* and *Josephine* his wife and the issue of their marriage, could take any interest under the settlement. He added that, as the administrator of *A. Falconer*, he claimed to have the *corpus* of the trust-fund and the dividends accrued thereon since the death of *Josephine Smith*, paid over to him, for the purpose of being applied in payment of *A. Falconer*'s debts.

Mr. *Knight Bruce* and Mr. *James Russell*, for the Plaintiff:

The Court in this case has to deal, not with a will, but with a deed. The ultimate trusts of the deed are for such persons as the settlor shall appoint by deed or will, and, in default of appointment, for his next of kin as if he had died intestate; consequently, everything was to be determined at the death of the settlor. It would then appear whether any appointment had been made or not; and, if none was made, the trustees were to hold the fund in trust for the settlor's then next of

kin. For the trust in default of appointment, is for the next of kin of the settlor *as if he had died intestate*: and no next of kin of an individual can take as if that individual had died intestate, except his next of kin living at his death. *Harrington* v. *Harte* (*a*); *Stert* v. *Platel* (*b*); *Pearce* v. *Vincent* (*c*); *Doe* v. *Lawson* (*d*); *Holloway* v. *Holloway* (*e*); *Masters* v. *Hooper* (*f*).

The cases of *Butler* v. *Bushnell* (*g*), *Briden* v. *Hewlett* (*h*), and *Bird* v. *Wood* (*i*), probably will be cited for the Defendants: but those cases, supposing that they are rightly decided, (which is very questionable) are distinguishable from the present case: for the words: "as if he had died intestate," are wanting in all of them: and, besides, in *Briden* v. *Hewlett* and *Bird* v. *Wood*, the power of appointment was given to the tenant for life of the fund; but here it is reserved to the settlor himself. Moreover, the decision in *Bird* v. *Wood* proceeded on a ground which is not noticed in the report of the judgment in that case, but is referred to, by Sir *John Leach*, M. R., in *Elmsley* v. *Young* (*k*).

(*a*) 1 Cox, 131.
(*b*) 5 Bing. N. C. 434.
(*c*) 2 Bing. N. C. 328; and 2 Myl. & Keen, 800.
(*d*) 3 East, 278.
(*e*) 5 Ves. 399.
(*f*) 4 Bro. C. C. 207.
(*g*) 3 Myl. & Keen, 232.
(*h*) 2 Myl. & Keen, 90.
(*i*) 2 Sim. & Stu. 400.
(*k*) 2 Myl. & Keen, 82; *see* 89. Sir *John Leach* there says that the report of *Bird* v. *Wood* is too short; and that the circumstance which governed the decision in that case, though noticed in the statement of the case, is omitted in the judgment. The fact, however, is that the judgments in all the cases reported by Messrs. Simons & Stuart, were copied from Sir *John Leach*'s own notes, and, moreover, were perused by his *Honor* before they were published.

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Mr. *G. Richards* and Mr. *Macqueen*, for *A. Rogers*:

The question is whether the only son of the settlor, who died under twenty-one, became entitled to the trust-fund, under the ultimate limitation in the settlement.— [The *Vice-Chancellor*: The first question is what is the natural meaning of the words in which the ultimate trust is expressed: and the second question is whether there is anything, in the settlement, to prevent their having their natural effect?]—The case of *Harrington* v. *Harte* is no authority for the point now under consideration for the question whether the fund was to go to the persons who were the next of kin of the testatrix at her death, or to those who were her next of kin at the death of her daughter, was not argued, but was given up by the defendant's counsel. Besides, the will contained no provisions or limitations adverse to the construction which the plaintiff's counsel contended for. In *Doe* v. *Lawson*, the property with respect to which the question arose, was real estate, and the Courts always struggle to hold limitations of real estate in remainder, to give vested interests: moreover, there was nothing, in the will in that case, which militated against that construction. In *Pearce* v. *Vincent*, the testator expressly directed that the next of kin who were to take under the ultimate trust in his will, should be the next of kin living at his decease. And the observations which Sir *John Leach* made on the certificate returned by the Barons of the Exchequer in that case, must not be overlooked (*l*). *Stert* v. *Platel*, like *Doe* v. *Lawson*, was a case of real estate, and was decided on the same principle as that case was.

(*l*) 2 Myl. & Keen, 811.

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In the clause which provides for the maintenance and education of the children, the trustees are directed to accumulate the surplus interest of the children's shares of the fund, for the benefit of such person or persons as should be entitled thereto by virtue of the settlement. Then the settlement, after providing for the advancement of the children, directs, in case there should be no child who should attain twenty-one, nor any daughter who should attain that age or marry, that the trustees should stand possessed of the fund or the residue thereof and the accumulated interest thereof, in trust for such person and persons as *A. Falconer* should appoint, and, in default of appointment, in trust for his next of kin. We submit that that part of the maintenance-clause which relates to the accumulation, coupled with the subsequent part of the settlement, clearly shows that some persons other than the children, were intended to be the objects of the ultimate trust. All the benefits which the children were to take, were conferred upon them by the preceding part of the settlement. A son was not to take anything unless he attained twenty-one; but, according to the construction which the Plaintiff contends for, he will take whether he attains that age or not. The trust for the next of kin, is not to take effect except in default of appointment; and the power to make that appointment, is not to arise except in the event of there being no child to take: can it then be said, with any regard to consistency, that a child is to take under the trust for the next of kin, or, in other words, that a party who is not to take if he dies under twenty-one, is to take under a limitation which is not to take effect unless he dies under twenty-one? The proper course in construing this as well as every other instrument, is to take the whole of it together; and then it will be seen that the settlor, having

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exhausted the issue of the marriage, provides, in words which have reference to a future period, for those persons who are to take in the event of there being no issue to take. *Jones* v. *Colbeck* (*m*). Every observation made, by Sir *W. Grant*, in that case, applies to the present. *Miller* v. *Eaton* (*n*); *Bird* v. *Wood*; *Briden* v. *Hewlett*; *Butler* v. *Bushnell* *.

The VICE-CHANCELLOR:

2d August. This case was first brought before me a few days ago, and I have since had an opportunity of looking into the settlement. It is material to observe that the question arises upon a deed; and, one of the first points to be considered, is whether the words, as they stand by themselves, admit of a clear meaning. If they do not, then we must look into the other parts of the instrument, to see what is the construction that ought to be given to the words that are not clear.

The words are: "In trust for the next of kin of the said *Alexander Falconer* according to the statutes for the distribution of intestates' estates, and as if the said *A. Falconer* had departed this life intestate." Now, *primâ facie*, those words create no ambiguity. They create a trust for the next of kin. Then it is said that, if we look into the body of the instrument, we shall find that those words which have a clear meaning, ought

(*m*) 8 Ves. 38. (*n*) Coop. 272.

* In the course of the argument, it was stated that the Plaintiff, as the administrator of *A. F. Falconer*, had come to a compromise with the surviving sisters and the representatives of the deceased brother and sisters of the settlor, and, therefore, the case was not argued by counsel on their behalf.

not to have that clear meaning attributed to them. That, therefore, is looking into the settlement not for the purpose of clearing up a doubt; but for the purpose of creating a doubt and substituting a forced construction instead of the plain one.

Then the question is whether the words in the body of the instrument, do create that doubt? Now, in the first place, it is observable that this settlement (which was an ante-nuptial settlement), recites, expressly, at its commencement, that it had been agreed that the sum in question should be settled, by *Alexander Falconer*, for the benefit of his intended wife and the children of the marriage. Therefore, the objects of favour were the wife and the children: but the result of the construction that was contended for, is to take away the favour intended for the children. Then the recital, as far as it goes, does support that construction which would have the effect of making the ultimate limitation take effect for the benefit of the children.

But it was said that the Court ought not to adopt that construction, because one of the clauses in the operative part of the instrument, militates against that construction, namely, a clause which gives a power, to the trustees, to maintain and educate the children out of the interest of the fund, and then directs the surplus to be accumulated. The words of that clause are: "upon trust that the trustees, from and after the decease of the said *Josephine Hume*, should, in the meantime and until the share or shares of such child or children as therein mentioned, should become payable by virtue of the now-reciting indenture, pay and apply such part of the interest and proceeds of the said trust-funds and securities as therein mentioned, for and

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towards the maintenance and education of such child or children, in such proportions as they, the said trustees or trustee, should, in their or his discretion, think fit, and should permit and suffer the surplus and residue of the interest and proceeds of the share or shares of such children or child respectively, to accumulate for the benefit of such persons as should be entitled thereto by virtue of the now-stating indenture." That clause, it was said, points, of necessity, to some other persons than the children. But put this case. Suppose there were six children; three or four might be otherwise provided for; and it might be unnecessary to apply any portion of the interest of their expectant shares, for their maintenance; and then there is to be an accumulation. Is it meant to be said that the objects of the accumulation, are not the children themselves? It is plain those words: "to such person or persons," have as much reference to the children, some or one of whom may ultimately become entitled, as it has reference to other persons who may not sustain the character of children.

The last observation which I have to make, is that it is impossible to read the clause in which the ultimate trust is expressed, without seeing that the person who framed it, has omitted one or two words which are generally inserted in clauses of the like nature, and which have been, at last, adopted for the purpose of excluding any question. If the draftsman had only gone on to say: "as if the said *Alexander Falconer* had departed this life intestate and unmarried;" then it would have been quite clear what was meant: the children would have been excluded. But there is an omission of those two words, which have been introduced for the purpose of determining what next of kin are to take. Whether those words were omitted by accident or on

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purpose, I am not to consider. The language which has been adopted by conveyancers, has been adopted for the purpose of excluding the question. Therefore, when I find the words not introduced, I must suppose that the party did mean, upon the face of the deed, that the words should operate according to their natural meaning, which is the next of kin living at the death of the settlor, though that next of kin might happen to be a child.

GRIFFITHS *v.* GALE.

1844: 23d February.

Appointment. Lapse. Construction. New Will Act, 7 W. 4 & 1 Vict. c. 26.

The enactment in the new Will Act, that a bequest to a child of the testator who dies in the testator's lifetime, leaving issue living at the testator's death, shall not lapse, does not apply to a testamentary appointment. *Semble.*

A WIDOW having a power to appoint a fund, by deed or will, unto and amongst all and every or one or more of her children, appointed a share of it, by her will, to one of her sons. By the deed creating the power, the fund was limited, in default of appointment, to all her children as tenants in common. The son died intestate a few days before his mother, leaving several children, who survived their grandmother.

The son's administrator presented a petition claiming the appointed share, under the new Will Act, 7 Will. 4 & 1 Vict. c. 26. The first section (the interpretation clause) enacts that the word 'will,' shall extend to a testament and to an appointment by will or by writing in the nature of a will in exercise of a power: and the 33d sect. enacts that a devise or bequest to a child of the testator, who dies in the testator's lifetime, leaving issue living at the testator's death, shall not lapse, but shall take effect as if the child had died immediately after the testator.

Mr. *Bethell*, for the petitioner, relied on the first and 33d sections of the Act.

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Mr. *Simons* appeared for the parties entitled in defau of appointment.

The VICE-CHANCELLOR:

The words used in the 33d section, are, 'devised bequeathed;' but property passing by the execution a power, is neither devised nor bequeathed. That se tion too enacts that the devise or bequest shall n *lapse*: therefore, I cannot think that it was meant apply to a testamentary appointment. The Legislatu could not have intended to vary the rights of the parti who the donor of the power had declared should entitled in default of appointment.

The point, however, is a very important one, an will allow the petition to stand over for further arg ment *.

* In *Johnson* v. *Johnson*, the only other case in whic construction has been put on the 33d section of the A Vice-Chancellor *Wigram*, in M. T. 1843, held that the is of a testator's deceased child could not claim the prope bequeathed to their parent; but that the parent's perso representative was entitled to it as part of his perso estate.—2 Jarman on Wills, 726 & 727.

MEMORANDA.

The decree in *D'Aglie* v. *Fryer*, the first case in this volu was affirmed by Lord *Cottenham*, C.

For the contents of note (*c*) in page 61 *ante*, substitut reference to 3 Beav. 49.

The case of *Farrar* v. *Lord Winterton*, referred to, in a n in page 140 of this volume, is now reported: *see* 5 Beav. 1.

END OF PART II. VOL. XII.

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

In re PARKE'S CHARITY.

1841: 30th July; and 1842: 18th April.

Charity. Jurisdiction. Stat. 52 *Geo.* 3, *c.* 101.

If it appears to be for the benefit of a charity that part of the estates belonging to it should be sold, an order for that purpose, may be made on a petition presented under 52 Geo. 3, c. 101.

THIS was a petition, presented under Sir *Samuel Romilly's* Act (52 Geo. 3, c. 101), by two of the inhabitants of the town of *Wisbech*, in the *Isle of Ely*, stating that, in 1628, *Thomas Parke* devised a house in *Ship-lane, Wisbech*, with the buildings thereto belonging, to the corporation of that town, to the use of the poor of the parish of *Wisbech* for ever: that the house and premises were copyhold of the manor of *Wisbech*; and that, some years ago, a piece of land, in *Crab Marsh*, in *Wisbech*, containing two acres and two roods, had been allotted, under an Inclosure Act, in respect of the house; and that, at the time when the petition was presented, the charity-estate consisted of a public-house, with the yard, stables, outbuildings, and two tenements adjoining, and also of the allotment in *Crab Marsh*: that, of late years, the rent of the estate had progressively diminished, notwithstanding the estate had been let, from time to time, by auction; and that the lessees of the principal part thereof, had given notice of their intention to quit the same at

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Michaelmas then next: that the public-house and the two tenements adjoining were very old and dilapidated, and required the outlay of a very large sum of money to put them into a state of good and substantial repair: that they abutted upon the principal entrance into *Wisbech* from *Lynn*, the River *Nene* being on the opposite side of the road: that the road, where the said charity premises abutted on it, was of the width of 16 feet only, and was bounded, on the side next the river, by a wharf, which was perpendicular for several feet in depth, and was kept in repair at the expense of the corporation of *Wisbech* and of the charity-estate, in equal proportions: that, by reason of certain alterations having been made, a few years since, in the outfall of the River *Nene*, the channel of it had been greatly scoured out and deepened; by reason whereof the wharf had become insecure, and had a tendency to slip into the channel of the river: that such deepening of the channel was still in progress, and would, in all probability, proceed for some time to come before the channel of the river had attained its greatest depth: that, by reason of the circumstances aforesaid, the reparation of the wharf had been, of late years, a source of great expense to the charity-estate; and that, in February then last, a great portion of the wharf gave way, and the road over it became impassable, and the same had been repaired merely in a temporary manner; but, nevertheless, at a large expense to the charity-estate: that, to repair and rebuild the wharf and road so as to secure the same and the charity premises from danger, owing to the increased depth of the river, would require a large outlay of money and be attended with a very heavy expense to the charity-estate: that the devised premises were copyhold, fine arbitrary; and that *Thomas Clarkson*, the sole surviving tenant thereof, was of the

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advanced age of 80 years, and that the admittance of a new set of tenants would be attended with a very heavy expense: that the corporation of *Wisbech* were desirous of purchasing the premises in *Ship-lane*, for the purposes of widening and improving the River *Nene* and the navigation thereof, and of effecting a permanent improvement to the town of *Wisbech*, and of widening and improving the road from *Wisbech* to *Lynn*; and that they had applied to the charity trustees to set a price upon the same with a view to the purchase thereof: that, under the aforesaid circumstances, it would be highly beneficial to the charity to dispose of the premises in *Ship-lane*, and to treat with the corporation for the sale thereof at a valuation by two indifferent persons or their umpire; and to lay out the purchase money in the purchase of other lands to be conveyed upon the trusts of the charity estate; but the trustees, although they were willing to act in the premises under the sanction of the Court, declined to take upon themselves to treat with the corporation.

The petition prayed that such directions might be given as, under the above circumstances, might be deemed necessary and proper for the management of the charity-estate and premises, so as to prevent the same from falling into decay, and the income of the charity thereby becoming further diminished; and that it might be referred to one of the *Masters* of the Court to approve of a scheme for such management, with liberty to consider and report upon the propriety of the proposed purchase, or of some other mode of disposing of the last-mentioned premises which might be most advantageous to the charity.

Mr. *Metcalfe* appeared in support of the petition.

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Mr. *Campbell*, for *Thomas Clarkson*, the surviving tenant of the copyhold part of the charity-estate, submitted that the Court had no jurisdiction to order, on a petition presented under 52 Geo. 3, c. 101, any part of a charity-estate to be sold; but that an information ought to be filed for the purpose of obtaining that object (*a*).

The VICE-CHANCELLOR:

The Act empowers The *Lord Chancellor* to make an order on petition in a summary way, in every case of a breach of any trust created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary *for the administration of any trust* for charitable purposes.

If it had been made a question in this case whether there was any trust for a charitable purpose, then an information would have been necessary. But the trust is admitted; and the relief asked has reference only to the mode of *administering* the charity property.

Refer it to the *Master* to inquire and state whether it is most fit and proper, regard being had to the will of *Thomas Parke* and to the objects of the charity, that the charity premises in the petition mentioned, or any and what part thereof, should be sold or otherwise disposed of; or whether the same, or any and what part thereof or the appurtenances thereto, should be repaired: If the *Master* shall be of opinion that it is most fit and proper that the said charity premises or any part thereof should be sold or otherwise disposed of, then let him inquire and state to the Court what mode of sale o

(*a*) *See* 2 Swanst. 302.

other disposition thereof will be most fit and proper: And let the *Master* be at liberty to receive proposals for the purchase of the said charity premises or any part thereof, from the corporation of *Wisbech* in the petition mentioned, or from any other corporate body, person or persons willing to purchase the same or any part thereof, and let him report upon such proposal or proposals, with his opinion thereon, to the Court. And, if the *Master* shall be of opinion that it is most fit and proper that the said charity premises or any part thereof, or the appurtenances thereto, should be repaired, then let him inquire and state to the Court what, in his opinion, ought to be the nature and extent of such repairs, and what expenses ought to be incurred in and about such repairs, and by and out of what funds the same ought to be borne and paid.

On the 5th of February 1842, the *Master* reported that it would be most fit and proper, regard being had to the will of *Thomas Parke* and to the objects of the charity and to the nature and circumstances of the charity-estates, that so much of the charity premises as consisted of the public-house with the yard and outbuildings and two tenements adjoining, should be sold, to the corporation of *Wisbech*, for 1,200*l.*: and, on the 18th of April 1842, the report was confirmed and an order was made in conformity to it.

Mr. *Metcalfe* appeared for the petitioners, Mr. *Craig* for *Thomas Clarkson*, and Mr. *Phillips* for the trustees of the charity-estates:

1841: 4th and 10th August, and 15th Nov.

BRYDGES and Another *v.* BRANFILL and Others.

BRYDGES and Another *v.* BRYDGES and Others.

Commission to examine witnesses. Depositions. Practice. Amendment. Interrogatories.

THE original bill was filed, in March 1836, by *John William Egerton Brydges*, a lunatic, by *F. D. Swann*, the committee of his estate, and by *F. D. Swann*, the said committee, against *C. E. Branfill* and several other persons. The answers of all the material Defendants were filed prior to November 1837. In Sep-

An order for a commission to examine witnesses, was made, on the application of the Plaintiffs, in a cause in which Sir *J. Brydges* and another were Plaintiffs, and *C. E. Branfill* and others were Defendants, by original and amended bill: and in which Sir *J. Brydges* and another were Plaintiffs, and Lady *Brydges* and others were Defendants, by bill of revivor and supplement. The commission was made out in *a cause* in which Sir *J. Brydges* and another were Plaintiffs, and *C. E. Branfill* and others were Defendants, by original bill and bill of revivor and supplement. In the title to depositions taken under that commission, both the original and amended bill and the bill of revivor and supplement were mentioned, and the names of the parties to each bill, were set forth at length. A motion by the Defendants to suppress the Depositions, grounded on the variance between the title of the commission and the title of the depositions, was refused.

Commissioners for examining witnesses, need not sign every skin of the interrogatories; it is sufficient if they sign the last skin.

Although it is usual to express in the title to depositions, that they have been taken by virtue of a commission, "to us (naming only the acting commissioners) and others directed," yet, if the names of *all* the commissioners are inserted, the depositions will not be suppressed because they are not signed by all the commissioners, provided they are signed by those who acted.

Commissioners for examining witnesses, omitted to certify, in their return to the commission, that they and their clerks, before acting, took the oaths annexed to the Commission. The Court, at first ordered the depositions to be suppressed; but on being satisfied, by the affidavit of one of the commissioners, that the oaths had been duly taken, allowed the return to the commission to be amended by inserting that fact.

tember of that year Sir *S. E. Brydges*, bart., who was one of the Defendants and the father of the Plaintiff *J. W. E. Brydges*, died; and, in December following another of the defendants died. In February 1838 the Plaintiffs amended their bill by adding 900 folios and three new Defendants, which made a new engrossment necessary. The answers of the material Defendants to the amended bill, were filed previously to November 1838. In September 1839, the Plaintiffs filed a bill of revivor and supplement against Lady *Brydges*, the widow and executrix of Sir *S. E. Brydges*, and eight other persons, one only of whom was a party to the original and amended bill.

In February 1840 the Plaintiffs obtained an order for a commission to examine witnesses. That order was intituled thus: "Between Sir *John William Egerton Brydges*, bart., late *J. W. E. Brydges* a lunatic, by *F. D. Swann*, the committee of his estate, and the said *F. D. Swann*, Plaintiffs, and *C. E. Branfill* &c. &c. (naming all the other Defendants), Defendants, by original and amended bill; and between the said Sir *J. W. E. Brydges*, by the said *F. D. Swann* the said committee of his estate, and the said *F. D. Swann*, Plaintiffs, and Dame *Mary Brydges* &c. &c. (naming all the other Defendants to the bill of revivor and supplement) Defendants, by bill of revivor and supplement." The commission which was issued in pursuance of that order purported to be a commission to examine witnesses in *a cause* wherein Sir *J. W. E. Brydges*, bart., by his committee, and another were Plaintiffs, and *C. E. Branfill* and others were Defendants by original bill and bill of revivor and supplement. So that neither the amended bill, nor the names of the parties to the supplemental bill, were mentioned. The short title of

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the supplemental suit, was: "*Brydges* and another against *Brydges* and others;" and no person of the name of *Branfill* was a party to it. In the title to the depositions taken under the commission, the amended as well as the original bill and the bill of revivor and supplement, were mentioned, and the names of all the parties to the original and amended bill and to the bill of revivor and supplement, were set forth. The Plaintiffs exhibited fifteen skins of interrogatories for the examination of their witnesses under the commission; but the commissioners signed the last skin only.

In June 1840, the Plaintiffs obtained an order for another commission. That order was intituled: "*Brydges* and another, Plaintiffs, against *Branfill* and others, Defendants, by original and amended bill:—*Brydges* and another, Plaintiffs, against *Brydges* and others, Defendants, by bill of revivor, and supplement." The commission that was issued under that order purported, as the previous commission did, to be for the examination of witnesses in *a cause* wherein Sir *J. W. E. Brydges*, bart., by his committee, and another, were Plaintiffs, and *C. E. Branfill* and others, were Defendants, by original bill and bill of revivor and supplement: and the depositions taken under it were intituled in the same way as the depositions under the previous commission. The commissioners returned the second commission, without certifying that they and their clerks, before they acted, took the oaths annexed to the commission*. Moreover, the depositions under that commission purported to be taken by all the commissioners (who were seven in number); although four of them only qualified and acted; and those four alone signed the depositions.

* *See* 2 Dan. Pract. 510.

A motion was now made, on behalf of *William Grane*, one of the Defendants to the original and amended bill, that the depositions taken under the commissions, might be suppressed.

Mr. *G. Richards*, Mr. *Anderdon*, and Mr. *Stinton*, in support of the motion, said, first, that the title of the commissions did not tally with the title of the orders under which they were issued: secondly, that the heading of the depositions did not correspond with the title of the commissions under which they were taken: thirdly, that the commissioners ought to have signed all the skins of interrogatories: fourthly, that, where some only of the commissioners acted, the practice was to express that the depositions had been taken by virtue of a commission: "to us (naming those who acted) and others directed;" but the depositions under the second commission, purported to have been taken by all the commissioners, and yet they were signed by only four of them: and, fifthly, that the commissioners, in returning that commission, had omitted to certify that they and their clerks had taken the required oaths: they added that, in consequence of the above irregularities, an indictment for perjury could not be sustained against any of the witnesses who might have sworn falsely. *Perry* v. *Silvester* (*a*); *Pritchard* v. *Foulkes* (*b*); *Campbell* v. *Dickens* (*c*); 1 *Smith's* Prac. 2d edit. 369; 2 *Dan.* Prac. 510; *Hind.* Prac. 345 and 236.

Mr. *Wigram* and Mr. *James Russell* appeared for the Defendant *Branfill*.

(*a*) Jac. 83. (*b*) 2 Beav. 133.
(*c*) 3 You. & Coll. 720.

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Mr. *Bethell*, for the Plaintiffs, objected that counsel for the Defendant *Grane*, were alone entitled to be heard in support of the motion. But

The *Vice-Chancellor* said that every one of the Defendants might have an interest in the question, whether the depositions ought to be suppressed or not; and, therefore, that their counsel must be heard.

Mr. *Knight Bruce* and Mr. *Parry*, for the Defendant *Brooks*, supported the motion on the same grounds as the counsel for the Defendant *Grane* had relied on, and added that the first commission authorized the commissioners to examine witnesses in one cause only, namely, *Brydges* v. *Branfill*; but that they had examined witnesses in two causes, namely, *Brydges* v. *Branfill*, by original and amended bill, and *Brydges* v. *Brydges* by bill of revivor and supplement. *Robert* v. *Millechamp* (*d*).

Mr. *Wakefield* appeared for the Defendants *Cooper*, *White*, and *Sterry*.

Mr. *Bethell* and Mr. *Hubback*, for the Plaintiffs, said that commissions for the examination of witnesses, were not seen by the solicitors of the parties who sued them out; but were sealed up and sent to the commissioners; and, consequently, the parties were not responsible for the form adopted, by the officer of the Court, in making them out: that no one could deny that *Brydges* v. *Branfill* was an original cause, and one in which a bill of revivor and supplement had been filed: that, in drawing up orders, commissions and other proceedings in a

(*d*) 1 Dick. 22.

cause, all that was requisite was to insert the title of the cause, and to refer to the bills existing in it; for, by giving the title of the cause, it was identified and distinguished from any other cause; and, therefore, the commissions in this case, were perfectly regular.—[The *Vice-Chancellor*:—The motion now before me, is to suppress the depositions; and, therefore, I have nothing to do except to determine whether *the depositions* are right. The propriety of the orders and the commissions issued under them, is not called in question by the notice of motion; therefore, they must be taken to be right for the present purpose.]

Argument for the Plaintiff continued.—If the commissions are to be taken as correct, in what respect are the depositions wrong? They mention both the causes and the names of the parties to them; and the heading of the interrogatories corresponds, precisely, with the heading of the depositions.

The next objection is that the commissioners signed the last skin only of the interrogatories. The answer to that objection is that there is no rule of the Court which requires them to do more; and even that seems to be superfluous; for the interrogatories are sufficiently identified by being returned with the commission (*e*).

(*e*) Lord *Bacon*'s 68th Order directs that: "All commissions for examination of witnesses shall be *super interr. inclusis* only; and no return of *depositions* into the Court, shall be received, but such only as shall be either comprised in one roll, subscribed with the name of the commissioners, or else in divers rolls, whereof each one shall be so subscribed."—Beam. Ord. 30. For the form of a commission, and the mode of proceeding under, and the return to it, *see* 2 Dan. Pract. 498–515.

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The next objection is that the commissioners, in their return to the second commission, have not certified that they and their clerks have taken the oaths. But the commission does not impose upon them the necessity of certifying those facts in their return. All that it requires them to return, is the examinations of the witnesses, closed up and under their seals, together with the interrogatories, "and this writ." If the authority of the commissioners was dependent upon their taking the oaths, then it might be necessary to mention the taking of them in the return. But their authority is quite independent of their taking the oaths: that step is not made a preliminary condition to their acting under the commission.

The only other objection is that, although the names of all the seven commissioners are mentioned in the heading of the depositions taken under the second commission, yet only four of them signed the depositions and the return to the commission. Now the commission authorizes any two or more of the commissioners to examine the witnesses, and it directs the return to be made by two or more of them. In this case, four of the commissioners qualified and acted, and those four signed the depositions, and also signed and sealed the return. Therefore, the requisition of the commission was fully complied with.

The VICE-CHANCELLOR:

With respect to the objection that the commissioners omitted to certify, when they returned the second commission, that they and their clerks, before they acted, took the oaths annexed to the commission, I wish to ascertain, before I pronounce any decision upon it, what

was done in the case of *Mackellar* v. *Mackellar* (*f*): but I will dispose of the other objections now.

The first objection is grounded on the variance between the title of the cause as mentioned in the commissions and in the depositions returned by the commissioners.

In the course of the argument a good deal of observation was made upon the commissions and the orders under which they were obtained: but I consider that I am not now required to give any opinion as to the propriety of those proceedings. All that I am required to do, by the notice of motion, is to suppress the depositions. That is all that is asked; and I must take the orders and the commissions to be right, until they are directly attacked.

The first question then that I have to decide, is whether there is such a variance, in the particulars which I have mentioned, between the commissions and the depositions, that I must suppress the latter.

The first commission was issued for the examination of witnesses in *a* cause in which Sir *John W. E. Brydges*, by his committee, and another, were Plaintiffs, and *C. E. Branfill* and others were Defendants, by original bill and bill of revivor and supplement. But, in the return made by the commissioners to that commission, the depositions taken under it, are described as depositions in a cause wherein Sir *John W. E. Brydges*, bart., late *John W. E. Brydges*, a lunatic, by *F. D. Swann* the committee of his estate, and the said *F. D. Swann*, are Plaintiffs, and *C. E. Branfill*, *J. S. Brooks* (naming

(*f*) Not reported.

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all the other parties) are Defendants, by original *and amended* bill: and wherein the said Sir *J. W. E. Brydges* by the said *F. D. Swann* the committee of his estate, and the said *F. D. Swann*, are Plaintiffs, and Dame *Mary Brydges*, *A. E. Brydges* (naming all the other parties) are Defendants, by bill of revivor and supplement. So that, in the commission, the cause is spoken of, shortly, as a cause in which Sir *J. W. E. Brydges* by his committee, and another, were Plaintiffs, and *C. E. Branfill* and others were Defendants by original bill and bill of revivor and supplement: but, in the depositions returned by the commissioners, the description is amplified by giving the names of all the parties. I think however, that that is only an amplification; and, my opinion is that there is a sufficient identification of the cause mentioned in the commission, with the cause in which the return states the depositions to have been made.

I also think that it is immaterial whether the bill in *Brydges* v. *Branfill*, was termed original and amended, or original only; for an original and amended bill are but one record.

In the second commission the cause is spoken of in the same terms as it is in the first commission; and, in the depositions taken and returned under the second commission, the cause is described in the same manner as it is in the depositions taken and returned under the first. Therefore the observations which I have made respecting the return to the first commission, will apply to the return to the second; and the consequence is that the objections founded on the variance between the commissions and the returns to them, cannot be sustained.

The next objection is that the commissioners have not signed every skin of the interrogatories. With

respect to that objection, I have to remark that I know of no order of the Court which requires that commissioners for the examination of the witnesses should sign all the skins of interrogatories. There are two orders of the Court which require interrogatories for the examination of witnesses (*g*), to be signed by counsel; but it always has been considered that that order is sufficiently complied with, if counsel sign the last sheet of the interrogatories. Besides, Lord *Bacon*'s Order requires that all commissions for the examination of witnesses, shall be *super interrogatoriis inclusis*, and the commissioners return the interrogatories with the depositions: I do not, therefore, see that there is the slightest reason for contending that the commissioners ought to have done more, in this case, than they have done: consequently, as far as the objection now under consideration goes, I can not suppress the depositions.

The last objection is that the depositions returned with the second commission, though signed by only four of the commissioners, were intituled as follows: "Depositions of witnesses produced, sworn and examined, on Wednesday the 7th day of October 1840, at the house of *John Jennings* in the city of *Canterbury*, by virtue of a commission issuing out of Her Majesty's High Court of Chancery, *to us, Thomas Wilkinson, W. Sladden, John Starr, Stephen Plummer, T. T. Delasaux, R. Furley* and *John Mumbray* directed, for the examination of witnesses in a cause &c." In support of that objection it was said that the title of the depositions ought to have stated that they were taken by virtue of a commission: "to us (naming the four commissioners who qualified and acted) and others directed;" and

(*g*) *See* Beam. Ord. 272 & 311.

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that, in that case, it would not have been necessary for any of the commissioners, except the four who were named, to sign the depositions. The commission, however, authorized any two or more of the commissioners to execute it; and, as four of them qualified and acted, it was quite sufficient for those four to sign the depositions and the return.

I have thus disposed of all the objections, except that which relates to the oaths.

9th August. On this day, The *Vice-Chancellor* said he had ascertained that the depositions in *Mackellar* v. *Mackellar* were ordered to be suppressed, because the commissioners had omitted to certify that they and their clerks had taken the required oaths; and, therefore, the like order must be made with respect to the depositions taken under the second commission in this case.

His *Honor*, however, on the application of Mr. *Bethell* (who stated that the commissioners who acted under the second commission and their clerks, did, in fact, take the required oaths before they acted), gave the Plaintiffs permission to move that the return might be amended by adding a certificate to that effect: and, in pursuance of that permission, the Plaintiffs served the following notice of motion: "That the commissioners who acted under a certain commission for the examination of witnesses in this cause, bearing date at *Westminster* the 9th day of September in the 4th year of the reign of Her present Majesty, and which commission was executed at the city of *Canterbury* on the 6th and several subsequent days of October last, may be at

liberty to amend their return to the said commission, by adding thereto a certificate that they did, previously to swearing or examining any witness or witnesses under the said commission, take the oath first specified in the schedule to the said commission annexed; and that all and every the clerks and clerk employed in writing, transcribing or engrossing the depositions of witnesses examined by virtue of the said commission, did, before they or he were permitted to act or to be present at such examination, severally take the oath last specified in the said schedule; and that the said commission and all proceedings thereunder may be taken off the file and delivered to the said commissioners, or any one of them, for the purpose of being so amended, and, when so amended, may be filed."

In support of that motion, an affidavit was made by one of the commissioners, which stated that the commission was duly executed at *Canterbury* on the 6th and several subsequent days of October 1840, and that the deponent and *Thomas Wilkinson*, *Thomas Thorpe De Lasaux* and *Stephen Plummer* acted as commissioners in the execution of the said commission: that, before any witness was sworn or examined under the said commission, the deponent and also the said *Thomas Wilkinson*, *Thomas Thorpe De Lasaux* and *Stephen Plummer* severally took the oath first specified in the schedule to the said commission annexed; and that every clerk employed in writing, transcribing or engrossing the deposition of any witness examined by virtue of the said commission, did, previously to such clerk being permitted to act as clerk or be present at such examination, severally take the oath last specified in the said schedule.

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The motion was made on the 10th of August, but was ordered to stand over, in order that search might be made for precedents.

The motion was now renewed by Mr. *Bethell* and Mr. *Hubback*; and was opposed by

Mr. *Wakefield*, Mr. *G. Richards*, Mr. *Russell*, and Mr. *Stinton*.

The Plaintiff's counsel relied on the three following cases, which had been extracted from *Reg. Lib.*

Dixie v. *Dixie.*

Rolls, 4th May 1702.

WHEREAS, upon the Plaintiff's humble petition preferred to the Right honourable the Master of the Rolls the 1st instant, shewing that, on Tuesday the 5th day of February last, a commission for examination of witnesses was executed, in this cause, at the house of *Judith Mathews*, widow, in *Market Bosworth*, in the county of *Leicester*, wherein the Defendants joined and examined one witness and cross-examined most of the Defendant's* witnesses, and the commissioners on both sides signed and certified the commission and the interrogatories and depositions on both sides, and the Defendant's commissioners brought the commission up to *London* and delivered the same into Court: that upon opening the commission, it appeared that the clerk who took the depositions, through inadvertency, omitted to set down the day of taking the depositions in the title thereof, and only mentioned the same to be taken at the house of the same *Judith Mathews*, which being

* Plaintiff's, *qu.*

not taken notice of by the commissioners, the same was, with that omission, certified and returned into Court: wherefore, and for that it appeared, by the certificate of the commissioners and affidavit thereto annexed, that the execution of the commission was begun on the day aforesaid and continued four days, it was prayed that the said mistake might be rectified, and the day of the month and year of our Lord inserted therein, and the record amended accordingly; which was ordered accordingly, unless cause on this day: and the clerks in Court on both sides this day attending, and the Defendant's clerk in court consenting that the said mistake should be rectified: His Lordship, on hearing the said petition read, doth order that the said mistake be rectified and amended, and that, between the word (taken) and the words (at the house of *Judith Mathews*, widow), in the title of the said depositions, be inserted these words, viz. (on Tuesday the 5th day of February, in the 13th year of the reign of our Sovereign Lord *William* the Third, by the grace of God King of *England*, *Scotland*, *France* and *Ireland*, Defender of the Faith, &c., anno Dom. 1701); and that the Plaintiff's six clerk do insert the same and amend the same accordingly.—A. 1701, fol. 271.

Chapman v. *Chapman.*

Before the Lord Keeper.

UPON motion this day made unto this Court, by Mr. *Carter*, being of the Plaintiff's counsel, in the presence of Mr. *Brown*, being of the Defendant's counsel, it was alleged that the commissioners for examination of witnesses in this cause have, in the commission by them executed, omitted the name of *William Carpenter*, exa-

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mined as a witness at the said commission, with his place of abode and age: that this cause is set down to be heard before his Lordship on the 4th day of July next; but the Plaintiff cannot be prepared for hearing on that day: it was therefore prayed that the commissioners for examination of witnesses in this cause, may amend the said depositions by inserting the name, age, and place of abode of the said *William Carpenter*; and that the cause may be adjourned over to be heard some time after the term: Whereupon and upon hearing of what could be alleged on both sides: it is ordered that this cause do stand adjourned over to be heard on the fourth day of causes after this term; and that, in the meantime, the said commissioners be at liberty to amend the said commission by adding the name, age, and place of abode of the said *William Carpenter* thereto.—A. 1711, fol. 453.

West and Others v. *Yerbury* and Others.

Before the Lord Chancellor.

WHEREAS, by an order of the 19th day of November last, for the reasons therein contained, it was ordered that the depositions taken in this cause, on the part of the Plaintiffs, at *Bridgewater* in the county of *Somerset*, on the 11th day of September 1711, should be discharged, and that the Plaintiff *West*, or Mr. *Jos. Dancey*, the minister of *Barton St. David's* in the said county, or one of them, should produce the register books of the said parish at the hearing of this cause, unless the Plaintiff *West* and the said *Dancey*, having notice thereof, should, at the second general seal after the last term, shew unto this Court good cause to the contrary: Now, upon opening of the matter this present

day unto the Right honourable the *Lord High Chancellor of Great Britain*, by Mr. *Attorney-general*, Mr. *Samuel Pratt*, Mr. *Fortescue* and Mr. *Mead*, being of the Plaintiffs' counsel, who came to shew cause against the said order, in the presence of Mr. *Samuel Hooper*, Sir *Peter King*, Mr. *Vernon* and Mr. *How*, being of the Defendants' counsel: it was alleged that the said commission was regularly executed at *Bridgewater* and afterwards adjourned to *Shepton Mallett* in the said county of *Somerset*, where *Abigail Provis* and *Hester Hodges* were duly sworn and examined by virtue of the said commission on such adjournment, the 14th day of September, as witnesses on the Plaintiffs' behalf, as by the affidavit of the Plaintiffs' commissioner and the clerk who attended the execution of the said commission appeared: but the commissioners having by mistake omitted to endorse, on the commission or depositions taken by virtue thereof, that the same was adjourned to *Shepton Mallett*, the Defendants endeavoured to procure the said *Provis* and *Hodges*, who are very old women, to make affidavit that they never were at *Bridgewater* in their lives nor examined at the said commission on the Plaintiffs' behalf, and had procured affidavits that the said *Provis* and *Hodges* had so declared; and, thereupon, obtained the said order of the 19th day of November for suppressing the said depositions: and as to the register book required by the Defendants to be produced, the same (if any such there be) was that which was kept in the late great Rebellion, and never was in the custody of the said *Dancey* or ever seen by him, as by his affidavit appeared, nor did the Plaintiff *West*, nor his agent, Mr. *Symons*, ever see such book, or use any endeavours to have the same concealed, as by their affidavit appears. And, therefore it was prayed that the said order of the 19th day of November may be dis-

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charged: Whereupon and upon hearing the Defendants' counsel and reading several affidavits, and hearing what was alleged on both sides: His Lordship allowed the cause now showed; and doth order that the order of the 19th day of November last, be discharged, and that the Plaintiffs' commissioners or either of them be at liberty to amend the said commission or depositions taken by virtue thereof, by endorsing or inserting that the said commission was adjourned to *Shepton Mallett*.—B. 1713, fol. 97.

The counsel for the Defendants said that the objection on which they relied, was an objection to the very essence of the commission; but the matters in which the commissions in the precedents produced, were allowed to be amended, were unimportant: that the latest of those precedents was dated so long ago as 1713; and they referred to *Campbell* v. *Dickens* (*h*).

The *Vice-Chancellor* said that, in *Mackellar* v. *Mackellar*, the motion was to suppress the depositions, and that no application was made, in that case, for leave to amend the return to the commission; that it did not follow that the cases which had been extracted from *Reg. Lib.* were the only instances in which the Court had allowed the return to a commission for examining witnesses to be amended; but that those cases seemed to him to be a sufficient authority for granting what was asked in the present case; that it would be extremely harsh not to allow a proceeding to be made right in appearance, which the Court knew, from indisputable evidence, to be right in fact and in substance; and, therefore, he should allow the return to be amended; but the Plaintiffs must pay the costs of the application.

(*h*) 3 You. & Coll. 720.

GLOVER *v.* WEBBER.

1844: 26th February.

Practice. Next friend. Infant.

Where the next friend of an infant Plaintiff dies, the proper order for the Defendant to obtain, is not that the infant may appoint a new next friend within a given time or that the bill may be dismissed; but that the *Master* may approve of a new next friend: and four days' notice of the order must be given to the Plaintiff's solicitor.

THE next friend of the infant Plaintiffs in this cause having died before decree,

Mr. *Randell* obtained an order, on behalf of the Defendant, that the infants might appoint a new next friend within a given time, or *that the bill might be dismissed.* But the Registrar, Mr. *Bedwell*, conceiving that the order, so far as it directed the bill to be dismissed, was not warranted by the practice of the Court, the motion was again mentioned on this day: and Mr. *Randell* then produced the following extracts from *Reg. Lib.*, with which Mr. *Bedwell* had furnished him.

Friday, 26th March 1742.

Between *Susanna Ludolph*, an Infant, by *Jacob Conen*, her next Friend, deceased - - - Plaintiff.

William Saxby and *Sarah* his Wife, and *Anne Ludolph* - - - - - - - Defendants.

UPON the Defendants, *William Saxby* and *Sarah* his wife, their humble petition, this day preferred unto the Right honourable the *Lord High Chancellor* &c. showing, among other things, that the said *Jacob Conen*, the Plaintiff's next friend, is dead, as by affidavit therein mentioned appears: It is ordered that it be referred to Mr. *Edwards*, the *Master* to whom this cause stands referred, within four days after notice hereof to the Plaintiff's clerk in court, to consider of a proper person to be *prochein ami* for the Plaintiff, in the room of the

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said *Jacob Conen*, deceased; and that such person as the said *Master* shall approve of, be the Plaintiff's *prochein ami*.—B. 1741, fol. 279.

Thursday, 22d March 1781.

Between the Right honourable *Mary* Countess Dowager of *Shelburne*, and *John Hamilton Fitzmaurice*, an Infant, by the said Countess, his Grandmother and next Friend - - - - - Plaintiffs.

Morough Earl of *Inchiquin* and Others - Defendants.

UPON the humble petition of the Defendant, the Earl of *Inchiquin*, this day preferred to the Right honourable the *Master of the Rolls*, setting forth (among other things) that the Plaintiffs exhibited their bill in this Court against the petitioner and others, to which bill the petitioner hath put in his answer, and obtained an order to examine a witness *de bene esse*: That the said Plaintiff, the Countess Dowager of *Shelburne*, the *prochein ami* of the Plaintiff, the infant, being dead, the petitioner is advised that objection may be taken to the regularity of such examination: That the petitioner hath applied to the Plaintiff's clerk in court, requesting that a new *prochein ami* may be appointed in the room of the said Countess Dowager of *Shelburne*, but says he has no instructions, although he has applied to the said infant's solicitor for that purpose: It is thereupon ordered that it be referred to Mr. *Eames*, one of the *Masters* of this Court, within four days after notice hereof to the Plaintiff's clerk in court, to approve of a proper person to be *prochein ami* for the Plaintiff, the infant, in this cause, in the room of the said Countess Dowager of *Shelburne*; and that such person as the

said *Master* shall so approve of, be the Plaintiff's *prochein ami*; and that the Plaintiff's bill be amended by inserting the name of the person who shall be so approved of by the said *Master* as the Plaintiff's *prochein ami*, instead of the name of the Plaintiff's said late *prochein ami*, now dead; and hereof notice is to be given forthwith (*a*).—A. 1780, fol. 157.

The VICE-CHANCELLOR:

The order ought to be made according to what has been done before. I shall follow the case of *Ludolph* v. *Saxby* as nearly as may be.

Refer it to the *Master* to approve of a new next friend, and give the Plaintiffs' solicitor four days' notice of the order now made*.

(*a*) *See* also *Lancaster* v. *Thornton*, Amb. 398, in which *Ludolph* v. *Saxby* and *Lady Shelburne* v. *Lord Inchiquin*, are referred to.

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* See *Bracey* v. *Sandiford*, 3 Madd. 468.

If the next friend of *a married woman* dies, the Court will order her to appoint a new next friend within a certain time, or the bill to be dismissed. *Barlee* v. *Barlee*, 1 Sim. & Stu. 100.

1844:
11th March.

GRIFFITHS *v.* GALE.

Ex parte JAMES JONES, THE ADMINISTRATOR OF STEPHEN JONES.

Appointment. Lapse. Construction. New Will Act, 7 W. 4, and 1 Vict. c. 26.

The enactment in the New Will Act, that a bequest to a child of the testator who dies in the testator's lifetime, leaving issue living at the testator's death shall not lapse, does not apply to a testamentary appointment.

A SHORT report of this case, as it came on to be heard on the 23d of February last, is given *ante*, p. 327. In pursuance of the permission then given, the case was again argued on this day; and, as it raised a question of considerable importance, it has been deemed advisable to give a fuller statement of the facts than the former report contains.

By an indenture dated the 26th of July 1794, being the settlement made in consideration of the marriage which had been solemnized between *Mary Moffatt Walbancke* and *John Jones*, the sum of 2,000*l.* stock, the lady's property, was assigned to trustees, in trust for her separate use for her life; and, after her decease, in trust for *John Jones* for his life; and, after the decease of the survivor of them, in case there should be only one child or two or more children of the body of *Mary Moffatt Jones*, in trust to transfer the stock to the same one only child, or unto and amongst all and every or such one or more of the same children, at such age or ages, and in such parts, manner and form as *John Jones* and *Mary Moffatt* his wife, at any time or times during their joint lives, by any deed or deeds, to be by both of them sealed and delivered in the presence of two or more credible witnesses, should direct or appoint; and, in default of such joint direction or appointment, then as *Mary Moffatt Jones*, in case she should survive *John Jones*, should, at any time or times after his death,

notwithstanding any future coverture, by any deed or deeds, writing or writings with or without power of revocation, to be by her executed as aforesaid, or by her last will and testament in writing, or by any writing purporting to be or in the nature of her last will and testament or a codicil or codicils, to be by her signed and published in the presence of the like number of witnesses, should direct or appoint; and, in default of and subject to such direction and appointment, unto all and every the child and children of *Mary Moffatt Jones* lawfully begotten or to be begotten, to be equally divided between or amongst them, if more than one, and, if there should be but one such child, then the whole to such one child, to be a vested interest in a son or sons on attaining 21, and in a daughter or daughters on attaining that age or previous marriage, with benefit of survivorship between such children if any or either of them should die without attaining a vested interest.

There was issue of the marriage four children, *William*, *Stephen*, *James* and *John*. *William* died intestate in July 1833, and his brother *John* took out administration to him. *John Jones*, the father, died in January 1839.

By a deed-poll dated the 5th of August 1839, *Mary Moffatt Jones*, in exercise of the power reserved to her by the settlement, directed one-third of the 2,000*l.* stock to be transferred, immediately after her decease, to *James Jones*.

She made her will on the same day, and thereby, after appointing her sons, *John*, *Stephen* and *James* her executors, and after reciting the settlement and the appointment which she had made, of one-third of the

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stock, in favour of *James*, she, in exercise of the power reserved to her by the settlement, appointed the remainder of the stock to *John* and *Stephen*, in equal shares, as tenants in common, their executors &c.: and, subject to the payment of her debts and funeral and testamentary expenses, she gave all the real estate which she then was, or, at the time of her death, might be seised of or entitled to for any estate or interest whatsoever, and also all her personal estate and effects whatsoever and wheresoever, to *John*, *Stephen* and *James* in equal shares as tenants in common, and to their respective heirs, executors &c.

Stephen Jones died in October 1843, intestate and a widower, leaving six infant children, all of whom were still living; and administration to his estate during their minorities, was granted to *James Jones*. *Mary Moffatt Jones* survived *Stephen*, and died on the 14th of October 1843.

Mr. *Bethell*, in support of the petition, which was presented by *James Jones*, who claimed, to be entitled as administrator to his brother *Stephen*, to the one-third of the 2,000*l.* stock appointed to *Stephen*, said that the will was made by *Mary Moffatt Jones* when she was discoverte, and that it contained not only an appointment of the property over which she had a power of appointment under the settlement, but also a disposition of property of which she was the owner; and, therefore, it was a will in the proper sense of the word, and not a testamentary writing in the nature of a will. He then referred to the 1st, 8th, 10th, 18th, 25th, 27th, and 28th sections of the late Will Act, and to the observation on the last-mentioned section, in page 89 of *Lord Sugden*'s Essay on the Law of Wills as altered by that

Act, namely, that that section applied to gifts by will under powers. He added that it appeared, from all the sections to which he had referred, and, more especially, from the 27th and 28th, that the words 'devised or bequeathed' in the 33d section, were intended to apply to devises or bequests made in exercise of powers of appointment, as well as to devises or bequests properly so called.

Mr. *Simons*, for *John Jones*, the son, said that it was apparent, from the words 'devise, bequest and lapse,' which were used in the 33d section of the Act, and from the Report of the Real Property and Ecclesiastical Commissioners *, that that section applied only to devises or bequests of property of which the testator or testatrix was the owner, and not to devises or bequests of property over which he or she had only a power of appointment. He referred also to the observations made on the 32d and 33d sections of the Act, in *H. Sugden*'s Essay, pages 111 *et seq.*: and added that, as *Stephen Jones* had died in his mother's lifetime, the appointment which she had made by her will in his favour, had become ineffectual; and, consequently, the share of the stock which he would have been entitled to if he had survived his mother, had become divisible, under the trust declared, by the settlement, in default of appointment, between *John* and *James Jones* in their own rights and as the personal representatives of their deceased brothers *William* and *Stephen* respectively.

The VICE-CHANCELLOR:

My opinion is against the proposition which Mr. *Bethell* has contended for.

* See *H. Sugden*'s Essay, Appendix, pp. 188, 220, 221, 222, 223, and 229.

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The Legislature, when it passed the Act in question, meant to interfere in the case of a person disposing of his own property, and also in the case of a person disposing of property over which he had a power of appointment: but, in the latter case, so far only as the form of executing the power was concerned. It might be very reasonable to say that, when a testator devised or bequeathed property to a child absolutely, and that child died in the lifetime of the testator, the devise or bequest should not lapse. But it is a totally different case, where a power of appointment is given, and, in default of appointment, the property is limited to specified objects. In that case the donee of the power has no estate to give, and has no control or dominion over the property except in the way directed by the donor of the power.

There are no words, in the Statute, which shew that wills made in execution of powers of appointment, are to be put on the same footing as the wills of those who have complete control and dominion over the property which is the subject of their disposition. If the section of the Act which has been particularly relied on, is looked at, it will be found to contain words which are sufficient to show that the operation of that section was meant to be restricted to the property of persons who, in the character of testators, had the property to give. That section enacts that, where any person, being a child or other issue of the testator, to whom any real or personal estate shall be *devised or bequeathed* for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such *devise or bequest* shall not *lapse*, but shall take effect as if the death of such person had happened immediately

after the death of the testator, unless a contrary intention shall appear by the will. The first section of the Act, which also has been much relied on, enacts that, in construing the Act, the word 'will,' shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power. There the meaning of the word 'will,' not of the words, 'devise or bequeath,' is expounded. Those words and the word, 'lapse,' which also is used in the 33d section, are totally inapplicable to an appointment by deed or will; for, where property is disposed of by virtue of a power, there is no lapse; the property goes over to specified objects, not by virtue of the intention of the donee of the power, who has no control over the property, but by virtue of the previous directions of the donor. The term 'lapse,' shews that the Legislature was speaking of a thing that might lapse: it shews that the Legislature was speaking of devises and bequests, properly so called; that is, of dispositions of property of which the testator was owner.

It is much too strong to say that the Legislature intended to control the disposition of property made by persons long since deceased, when the Act itself contains an express provision that it shall not extend to any will made before the 1st day of January 1838, unless the will shall have been re-executed, re-published or revived after that day (*a*). If I were to put that interpretation on the Act which Mr. *Bethell* has contended for, I should not only violate that express provision, but also, as I before observed, disappoint the dispositions made of their property by persons long since deceased.

(*a*) Sect. 34.

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On these grounds, my opinion is that the Legislature, when it passed the Act in question, did not intend to interfere with powers of appointment further than by saying that the execution of them in a given form, should be deemed a sufficient execution.

Before the Act was passed, it was sent to me in draft, and I made certain alterations in it; but I have not the slightest impression that what is now contended for, was meant to be comprehended in the 33d section; and I am morally sure that, if it had been, I should have recollected it and have altered the language of the 33d section.

At the same time, if the petitioner wishes to take a case for the opinion of a Court of Law, I will permit him to do so*.

* The case was not taken.

WILSON *v.* JONES.

1843:
8th Dec.

Construction. New Orders of August 1841. *Defendant. Answer.*

Although a Defendant's name is omitted in the note at the foot of the bill, he must put in an answer, though it be a mere formal one.

MOTION to discharge an attachment which had issued against one of the Defendants for want of answer, on the ground that his name was omitted in the note at the foot of the bill *. His name, however, was inserted in the clause commencing: "To the end therefore," and also in the prayer of process; and he had been served with a subpœna to appear and answer.

Mr. *Terrell*, in support of the motion, relied on the 16th Order of August 1841, which provides that a Defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and that a Defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such Defendant is required to answer. He also contended that the Plaintiff ought to have served the Defendant with a copy of the bill, under the 23d Order of August 1841.

Mr. *Mylne*, for the Plaintiff.

The VICE-CHANCELLOR:

The 23d Order affords an inference which is against rather than in favour of the motion; for it gives the Plaintiff an option whether he will or will not require an answer from a Defendant against whom no direct relief is prayed. Now, here the Plaintiff has exercised that option by requiring the Defendant, on whose behalf the motion is made, to answer the bill.

* *See* 17th Order of 26th August 1841.

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The 16th Order says that a Defendant shall not be bound to answer any of the interrogatories in the bill, except those which he is specially required to answer: but it does not exempt him from the necessity of putting in an answer. If the Plaintiff does not choose to ask him to answer any thing specially, he may put in an answer without answering specially. He must, however, put on the record that which, in form at least, is an answer.

1844: 18th March.

MAWHOOD *v.* LABOUCHERE.

New Orders of August 1841. *Practice.*

Under the 24th Order of August 1841, the Court will allow the Plaintiff to enter a memorandum of service of a copy of the bill, without an affidavit stating the nature of the suit and that no direct relief is sought against the Defendant who has been served.

MR. *E. MONTAGU*, for the Plaintiff, moved, under the 24th General Order of August 1841, for leave to enter a memorandum of service of a copy of the bill on one of the Defendants. He stated that he was not furnished with an affidavit disclosing the nature of the suit or showing that no account, payment, conveyance or other direct relief was sought against the Defendants: and he called the attention of the Court to *Haigh* v. *Dixon* (*a*).

The VICE-CHANCELLOR:

I am of opinion that there is no necessity for such an affidavit. Every Court is presumed to know the contents of its own records; and an affidavit on the subject is not evidence.

Order made.

(*a*) 1 Youn. & Coll. N. C. 180; *see* also *Davis* v. *Prout* 5 Beav. 102.

EVERETT *v.* PRYTHERGCH.

1841: 11th Nov.

Contempt. Scandal. Defendant. Practice. Impertinence.

A Defendant, though he is in contempt for want of answer, may except to the bill for scandal, but not for impertinence.

THE Defendant, after an attachment had issued against him for want of answer, filed exceptions, to the bill, for scandal and impertinence; and afterwards obtained an order, as of course, referring the bill and exceptions to the *Master*. All the exceptions, except the ninth, were for scandal and impertinence: the ninth was for impertinence only*.

Mr. *Girdlestone* and Mr. *Barber*, for the Plaintiff, now moved that the exceptions might be taken off the file and the order be discharged, for irregularity, on the ground that the Defendant, when he filed the exceptions and obtained the order, was in contempt, and, therefore, could not be an acting party in the cause, except for the purpose of clearing his contempt. *Howard* v. *Newman* (*a*); *Beavan* v. *Waterhouse* (*b*).

Mr. *Romilly*, for the Defendant, said that there were many exceptions to the rule that a party in contempt could not be heard except for the purpose of clearing his contempt: *King* v. *Bryant* (*c*); *Wilson* v. *Bates* (*d*): that a bill, answer, or other proceeding in a cause, might be referred for scandal at any time: *Fenhoulet*

* It is scarcely necessary to mention that the Court considers matter that is scandalous, to be impertinent also.

(*a*) 1 Molloy, 221.
(*b*) 2 Beav. 58.
(*c*) 3 Myl. & Craig, 191.
(*d*) Ibid. 197.

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v. *Passavant* (*e*); *Anon.* (*f*); *Ex parte Simpson* (*g*); *Nedby* v. *Nedby* (*h*); *Anon.* (*i*).

The VICE-CHANCELLOR:

The *Anon.* Case in 5 Ves. is a direct authority that a Defendant, although he has taken out an order for time to answer, may refer the bill for scandal: and the question is whether, so far as the present question is concerned, there is any substantial distinction between a party's having taken out an order for time to answer (whereby he submits to answer), and a party's being in contempt for want of answer.

Notwithstanding Lord *Bacon*'s 48th Order says: "They that are in contempt, especially so far as a proclamation of rebellion, are not to be here (heard *qu.*) neither in that suit nor any other, except the Court, of special grace, suspend the contempt;" yet Lord *Cottenham* C., in *Bates* v. *Wilson*, mentions cases in which a party, though in contempt, was entitled to be heard.

Until the reference for scandal is disposed of, the Defendant cannot tell what he ought to answer; and, in my opinion, although he is in contempt, he has a right to call upon the Court to tell him what it is that he is bound to answer.

I think, therefore, that, upon the principle of the *Anon.* Case in 5th Ves., the Defendant, in this case, is entitled to proceed with the reference so far as scandal is concerned; that is to say, he is entitled to go on with

(*e*) 2 Vez. 23.
(*f*) Ibid. 631.
(*g*) 15 Ves. 476.
(*h*) *Ante*, Vol. VIII. p. 334.
(*i*) 5 Ves. 656.

all the exceptions except the ninth. That exception is for impertinence only: the other exceptions are for scandal and impertinence; whatever is scandalous being impertinent also. But, as there is some degree of authority for the application, I can not give the Defendant the costs of it.

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1841: 18th Dec.

Scandal.

A creditor filed a bill against the debtor's executor, stating, first, that the Defendant was a person of bad character, of drunken habits and violent behaviour, and then adducing instances in support of that statement; and praying that the assets might be administered under the direction of the Court, and for an injunction and receiver. Held that the general statement and the instances, were relevant to the relief asked, and therefore were not scandalous.

The bill was filed by creditors of a testator against the Defendant *Prythergch* and his wife (the latter being the executrix of the will), stating that the testator's personal estate was insufficient or barely sufficient to pay his funeral and testamentary expenses and debts; and that the Defendants were persons of bad character, of drunken habits, violent and disorderly in their conduct, and in a state of great poverty. The bill then proceeded to state various particulars in support of the above general allegation respecting the character, conduct and circumstances of the Defendants; such as that they were frequently drunk five times in a week; that they often quarrelled with each other; that they had surreptitiously left a house which they rented at a small weekly sum, leaving 15*s.* of the rent unpaid; that the husband went about very shabbily dressed, with his clothes torn, and with holes in his shoes; that he frequently pawned his own and his wife's clothes; and that he had expressed himself willing to perjure himself if he could get any thing by it &c. &c. The bill prayed for an account and for the administration of the testator's estate, and for an injunction to restrain the Defendants from collecting the assets, and for a receiver.

The bill, as is stated in the preceding part of this Report, was excepted to for scandal and impertinence: and, the *Master* having allowed all the exceptions,

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except those which related to the above general allegation, the Plaintiffs excepted to his report.

Mr. *Girdlestone* and Mr. *Barber*, in support of the exceptions to the report, contended that all the allegations in the bill respecting the character, conduct and circumstances of the Defendants, were relevant to the relief prayed; as they tended to show that the Defendants were not fit to be trusted with the testator's property: that the case of a creditor was different from that of a legatee; for the latter was a mere volunteer, and, therefore, there was some reason for saying that he was not entitled to complain of the person to whom the testator had thought proper to entrust his property: that, as the *Master* had considered the general allegation not to be scandalous, he ought to have come to the same conclusion with regard to the particular allegations respecting the character, conduct, and habits of the Defendants; for the principle that was applicable to the former, was equally applicable to the latter.

Mr. *G. Richards* and Mr. *Romilly* said that no one had ever heard of notoriety of bad character (that is, what the neighbours thought of an individual) being proved either at law or in equity; that, when an executor applied for probate of a will, the Ecclesiastical Court never inquired into the moral character of the party making the application: that it was sufficient that the testator had thought proper to entrust that individual with the administration of his property; and that a person might be honest, though he was poor and shabbily dressed.

The VICE-CHANCELLOR:

I am under the necessity of differing from the *Master*.

I think that it is a most delicate part of the jurisdiction of this Court to determine how strong a Plaintiff is at liberty to make his case. He frames it as he pleases, and states a number of circumstances in support of it: but I am not aware that the Court has ever abridged him of his right to state as much as he thinks fit, merely because some of those circumstances might have been sufficient.

In the case of *Morrice* v. *Salisbury*, which occupied the Court the greater part of a fortnight during the last term, a party was sought to be charged with certain sums of money which it was alleged that, but for his wilful default, he might have received: and, in order to get a decree under which the Defendant might be so charged, the Plaintiff entered into a great number of instances of default, where one or two instances would have been sufficient for the purpose. But I considered that it was not the duty of a Judge to limit the number of instances which a Plaintiff may think proper to adduce for the purpose of supporting his case: and, therefore, I heard the whole throughout.

Now, here the bill is filed to have such a proper administration of the testator's estate as will enable the Plaintiffs and the other creditors, to obtain payment of their debts. And, in order to show that this is a proper case for the Court to grant an injunction and a receiver, the Plaintiffs, first of all, state, in a general way, that the executrix and her husband are persons of bad character, drunken habits and great poverty: and then, in order to support that general charge, a great number of particulars are detailed which tend to show their poverty, drunkenness and outrageous conduct. A Plaintiff, as I said before, has a right to make his case as

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strong as he can: and, when there is a question about the administration of assets, it is surely of importance to make out that the person who has the power over and the sole management of them, is a person of violent conduct and drunken habits. His duty is to collect the assets and to pay the debts; and, where peaceful conduct is so indispensable, it is material for a Plaintiff, who is seeking for an injunction and a receiver, to enter into instances of violent conduct: and it is obvious that the assets can not be safe in the hands of a person who is in the habit of being drunk. The Plaintiffs have obtained an injunction on affidavits verifying the allegations in the bill; and, when the cause comes on to be heard, the Court must determine whether that injunction ought to be continued or not; and, if those charges which have been deposed to on an interlocutory proceeding, are proved at the hearing, the Court will continue the injunction and the receiver. Therefore it is necessary, with a view to the decree, that the matters objected to should be stated. So that, on the whole, I am of opinion that the *Master* has erred in allowing any of the exceptions for scandal and impertinence.

It is singular that the *Master* should have overruled the exceptions so far as they relate to the general charge, and yet have allowed them so far as they relate to the particular instances which are adduced in support of that general charge. The general charge of bad character, is not a charge of general bad character, but of bad character in respect of drunkenness and violent behaviour.

BRYDGES and Another *v.* BRANFILL and Others.

BRYDGES and Another *v.* BRYDGES and Others.

1841: February, March, and 16th April.

A MOTION in the above causes, is reported *ante*, p. 334.

Fraud. Partners (liability of). Solicitors.

A tenant for life of settled estates, obtained an Act of Parliament for selling the estates and investing the proceeds, under the direction of the Court, in the purchase of other lands to be settled to the same uses. After the estates had been sold and the money paid into Court, the tenant for life fraudulently obtained an order, under which part of the money was paid out to him. Messrs. *B.*, *G.* and *C.*, solicitors and copartners, acted as the solicitors of the tenant for life, in obtaining the orders and in every other proceeding under the Act. *B.* was aware of the fraud; but *G.* and *C.* were wholly ignorant of it. Held, nevertheless, in a suit instituted by the remainder-man after the death of the tenant for life, that *G.* and *C.* as well as *B.*, and the estate of the tenant for life, and all the other parties to the transaction, were jointly and severally liable to make good the money.

The causes now came on to be heard. The pleadings and depositions were very voluminous, and the arguments of counsel occupied several days; but, as the only important question of law that arose, was as to the liability of the Defendants *Grane* and *Cooper*, the following Report is confined to that question.

Thomas Barrett, Esq. died in 1803, having devised his estates in *Kent*, upon trusts under which Colonel *Brydges Barrett*, and the Plaintiff *John W. E. Brydges*, the first and second sons of Sir *Samuel Egerton Brydges*, Bart., became successively tenants for life, and the Defendant Mrs. *Holmes*, the widow of Colonel *Holmes*, the late Mrs. *Quillinan*, the wife of the Defendant *Edward Quillinan*, and the Defendant Mrs. *Swann*, the wife of the Plaintiff *F. D. Swann*, three of Sir *S. E. Brydges*'s daughters, became tenants in common in tail in remainder of the estates. In June 1822, Colonel

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Barrett obtained an Act of Parliament for selling the devised estates and investing the proceeds in the purchase of other estates, to be settled upon the trusts of the will; it being the Colonel's intention that certain estates in *Kent* of which his father was tenant for life and he himself was the remainder-man in fee, should be purchased out of the monies to arise from the sale of the devised estates, at a price much above their real value. Colonel *Barrett*, in order to facilitate the attainment of his object, procured the trustees of Mr. *Barrett*'s will to be removed before he applied for the Act, and his relative, the Defendant *Branfill*, and his half-brother, the Defendant *A. E. Brydges*, to be appointed in their place. In July 1822, Colonel *Barrett* communicated, to his father, the plan which he had formed, in a letter containing the following passage: "The plan is to sell; and, when the money is in the Accountant-general's hands, for you to take it, if you choose, for the smallest portion of land to be settled in lieu: which can be done with the approbation of a *Master*; which will be managed by having as high a valuation as possible put upon any lands which you may choose to be so disposed of."

In July 1829, Sir *S. E. Brydges* and Colonel *Barrett*, in pursuance of that plan, agreed, colourably, to sell part of the estates of which they were seised as before mentioned, to the Defendant *Quillinan*, for 3,000*l.*, and another part of the same estates, to the same gentleman, for 4,596*l.** A conveyance was afterwards executed in pursuance of that agreement, in which Mrs.

* The Act, as is usual in like cases, directed the monies to arise from the sale of the devised estates, to be paid into Court, and to be laid out in the purchase of other estates, under the direction of the Court.

Whitby (who was a mortgagee of the first portion of the lands sold to *Quillinan*), and Messrs. *Shepherd* and *Crozier* (who were mortgagees of the other portion), joined; and, in February 1830, sums amounting to 3,000*l.* and 4,596*l.* were paid to them respectively; but those sums were not sufficient to cover the whole of what was due to them. By means of that fictitious sale, a fraud was practised on the mortgagees; for the lands sold were in fact worth more than the two sums, amounting together to 7,596*l.*, at which *Quillinan* was represented to have purchased them.

In December 1829, a state of facts and a proposal to purchase the two last-mentioned properties, from *Quillinan*, for 22,600*l.* (which was proved, by evidence in the suit, to be more than their value), was submitted to the *Master* (*Dowdeswell*) on behalf of the trustees, *Branfill* and *A. E. Brydges*, together with a valuation made by Mr. *Westwood*, a land surveyor, and duly verified, stating the properties to be worth that sum. The *Master* having approved of the proposal, three abstracts purporting to be abstracts of *Quillinan*'s title, were laid before the *Master*. The *Master* approved of the title; and, by indentures of lease and release, dated the 20th and 21st of January 1830, *Quillinan* conveyed the properties to the trustees upon the trusts of Mr. *Barrett*'s will. The Defendant *Grane* was one of the parties to the release. On the 25th of the same month, an order was made, on a petition presented in the names of the trustees, for payment of the 22,600*l.* to *Quillinan*, out of the monies arisen from the sale of the devised estates. The Defendant *Brooks* received that sum from the Accountant-general under a power of attorney from *Quillinan*.

The Defendant *Brooks* and the Defendant *Grane*,

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his partner, were the solicitors employed to obtain the Act of Parliament; and they, until the year 1825, and, from that year, they and the Defendant *Cooper*, who then entered into partnership with them, were the solicitors of Colonel *Barrett* and the trustees, in the transactions before mentioned. *Brooks* was privy to *all* the circumstances of those transactions; but neither of his partners was aware that there was any fraud or irregularity in them.

In May 1830, an account was delivered by *Brooks, Grane & Cooper*, to Sir *S. E. Brydges* and Colonel *Barrett*, in which Sir *S. E. Brydges* and Colonel *Barrett* were credited with the 22,600 *l.*, and debited with various sums amounting, in the whole, to more than that sum, for costs, monies lent &c. The following was one of the items on the debit side of the account: "To costs of *recent arrangements*, as per Colonel *Barrett*'s Letter of the 14th of January - - - £.1,050."

In June 1834 Colonel *Barrett* died abroad in very distressed circumstances. His half-brothers *Anthony Rokeby Brydges* and the Defendant *Anthony Egerton Brydges* were his executors, and *Anthony Rokeby Brydges* proved his will.

In 1836 the original bill was filed by *John W. E. Brydges* (who was a lunatic) by *Swann* as his committee and by *Swann* in his own right, against *Branfill, Brooks, Grane, Cooper, Anthony E. Brydges, Quillinan*, Mrs. *Holmes, Quillinan*'s children, Mrs. *Swann* and *A. Rokeby Brydges*, praying, amongst other things, that it might be declared that the pretended sale by *Quillinan* to the trustees, was a fraud upon the Plaintiff *J. W. E. Brydges* and the other parties interested under Mr. *Barrett*'s will who were not privy to such

fraud; and that it might be declared that the Defendants *A. E. Brydges*, Sir *S. E. Brydges*, *Quillinan*, *Brooks*, *Grane & Cooper*, and the personal estate of Colonel *Barrett*, were jointly and severally liable, in respect of such fraud, to make good the 22,600*l.*: the Plaintiffs being ready and willing, upon that sum being made good, to deal with the hereditaments and premises, fraudulently purchased from *Quillinan*, in such manner as the Court should think just; and to deliver up the hereditaments and premises, if the Court should think the Plaintiffs bound so to do, to *Quillinan*: but, if the Court should be of opinion that the Plaintiffs were not entitled to have the whole of the 22,600*l.* made good, then that it might be declared that the Plaintiffs were entitled to have the difference between the 7,596*l.*, or such other sum as was the real value of the hereditaments and premises at the time they were conveyed to the trustees by *Quillinan*, and the 22,600*l.*, made good.

Sir *Samuel Egerton Brydges* died in September 1837: Lady *Brydges*, his widow, was his personal representative. *Anthony Rokeby Brydges* died in December following; without having answered the bill. After his death, *Anthony Egerton Brydges* proved Colonel *Barrett*'s will. In September 1839 the Plaintiffs filed a bill of revivor and supplement against Lady *Brydges*, *Anthony Egerton Brydges* and other parties. *Anthony E. Brydges* was made a party to that bill on account of his having proved Colonel *Barrett*'s will*.

* After the pleadings had been opened, it was objected, by the counsel for some of the Defendants, that the supplemental bill ought to have prayed that *Anthony Egerton Brydges* might answer the original as well as the supplemental bill: for that he had answered the former, in the character of one of the trustees of the devised estates; but that he had since proved Colonel *Barrett*'s will, and thereby

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Mr. *Bethell*, Mr. *Chandless*, and Mr. *Hubback*, for the Plaintiffs, said, with respect to Mr. *Grane*, that he had acquired a new character, namely, that of Colonel *Barrett*'s personal representative; and that he ought to have answered the original bill in his new character, for otherwise the Court could not make a decree against Colonel *Barrett*'s estate.

The VICE-CHANCELLOR:

A Defendant is a Defendant in every character which the statements of the bill show that he bears. The original bill stated the death of Colonel *Barrett*, and that he appointed *A. R. Brydges* and *A. E. Brydges* his executors; and that *A. R. Brydges* alone proved the will, and thereby became the sole legal personal representative of Colonel *Barrett*. But that is not true in point of law: for where there are two or more executors, probate by any one of them makes them all personal representatives, unless they renounce. So that *A. E. Brydges* was as much the personal representative of Colonel *Barrett*, as *Anthony Rokeby Brydges* was.

Besides, *A. E. Brydges*, in his answer to the original bill, states that *A. R. Brydges* was dead, and that he himself was the sole surviving executor of Colonel *Barrett*, but had not proved the Colonel's will. So that *A. E. Brydges* has, in fact, answered the original bill in the character of Colonel *Barrett*'s personal representative.

Another preliminary objection was that the personal representative of *A. R. Brydges* was a necessary party; as the original bill alleged that he had possessed assets of Colonel *Barrett*.

The Plaintiff's counsel said that the supplemental bill stated that *A. R. Brydges* did not possess assets of Colonel *Barrett*; and that, even if he did possess assets, his personal representative was merely a debtor to the estate, and that it was not necessary that a mere debtor should be a party.

The VICE-CHANCELLOR:

The original bill avers, positively, that *A. R. Brydges* did

was as well aware, as Mr. *Brooks* was, of the fraudulent nature of the transactions to which the bill related, and that he actively co-operated, with *Brooks*, in the management of them. With respect to Mr. *Cooper*, they said that though he might have no personal knowledge of the blacker parts of the transaction, yet he must have known that the sale to *Quillinan* was a mere pretence, and that the sale by him to the trustees, was an imposition, and that the purchase-money was not paid to *Quillinan*, as it would have been if he had been the real owner of the lands sold, but was applied, in part at least, in paying the firm in which he was a partner a *bonus* of one thousand guineas (in which he participated) for their concurrence in and management of the transaction: so that there was quite sufficient to fix him with legal notice of the fraud, though there might not be enough to affect his moral character or his honour. *Cholmondeley* v. *Clinton* (*a*); *Willet* v. *Chambers* (*b*); *Rapp* v. *Latham* (*c*); *Stone* v. *Marsh* (*d*); *Moreton* v. *Hardern* (*e*).

possess assets; but the statement as to that fact in the supplemental bill, is made only according to the Plaintiffs' information and belief: therefore I must take the averment in the original bill to be correct; especially as the objection is made on behalf of Defendants who are sought to be charged, and, therefore, have a right to elect which of the two statements shall be taken as true. I think, therefore, that the Defendants have a right to have the personal representative of *A. R. Brydges* brought before the Court.

The cause stood over in order that *A. R. Brydges*'s personal representative might be made a party: and, that having been done, the hearing of the cause was proceeded with.

(*a*) 19 Ves. 272.
(*b*) Cowp. 814.
(*c*) 2 Barn. & Ald. 795.
(*d*) 6 Barn. & Cress. 551.
(*e*) 4 Barn. & Cress. 223.

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Mr. *James Russell* and Mr. *Craig*, for the Defendant *Branfill*.

Mr. *Walker* and Mr. *Parry*, for the Defendant *Brooks*.

Mr. *G. Richards* and Mr. *Stinton*, for the Defendant *Grane*, cited *Sainsbury* v. *Jones*(*f*); *Bowles* v. *Stewart* (*g*); and *Arnot* v. *Biscoe* (*h*).

The *Solicitor-general* and Mr. *Romilly*, for the Defendant *Cooper*, said that Mr. *Cooper* denied, by his answer, that he had any participation in, or even knowledge of the alleged fraud, and there was not the slightest evidence to show that he was aware that there was any fraud or even irregularity in the transaction: that, with respect to him, the case must be considered as if he were on his trial for a conspiracy; and then there could be no doubt that he would be acquitted, as there would be nothing to show that he had been guilty of penal misconduct: that the rule of law with respect to the liability of one partner for the acts of his copartner, was that, if a partner pledged the credit of the firm, if he entered into a contract in the name of the firm, the firm would be liable, although he intended to commit a fraud in the name of the firm: but that rule was founded on the principle that the party with whom the contract was made, had trusted the firm, in consequence of the authority which one member of a firm has to pledge the character and credit of the other members; and that all the cases which had been cited for the Plaintiffs were decided on that principle (*i*): that, in

(*f*) 2 Beav. 462.
(*g*) 1 Scho. & Lef. 209.
(*h*) 1 Vez. 95.
(*i*) *See* Collyer on Partnership, 241.

Moreton v. *Hardern*, the action was held to be sustainable against the firm, because the injury done to the Plaintiff arose from the *negligence* of one of the partners; but that if it had arisen from the wilful act of one of the partners, that partner alone would have been liable: that the Plaintiffs in the present case never had any dealings or transactions with the firm of *Brooks, Grane & Cooper*; to them the credit of the firm was never pledged: that the trustees were the parties who trusted the firm; but there was no privity of contract whatever between the Plaintiffs and the firm: that there was no case in which an innocent partner had been held liable for the fraud or wilful misconduct of another partner, where there was no privity of contract and no partnership transaction, but a wrongful act was done, which eventually proved injurious to a person who never had any dealings or transactions with the partnership. *Rex* v. *Manning* (*k*); *Longman* v. *Pole* (*l*).

Mr. *Nevinson* appeared for the Defendant *Anthony Egerton Brydges*.

Mr. *Piggott* appeared for the Defendant *Quillinan*.

Mr. *Stuart* and Mr. *Elmsley* appeared for the Defendant Mrs. *Holmes*: and

Mr. *Wakefield*, Mr. *Cooper*, Mr. *Hansard* and Mr. *Austen* appeared for the other Defendants.

Mr. *Bethell*, in his reply, commented on several letters which had been written by Mr. *Grane*, relating to the matters mentioned in the bill, and which, he contended,

(*k*) Comyns' Rep. 616. (*l*) Dans. & Lloyd, 126.

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proved that Mr. *Grane* was cognizant of the fraud from the beginning to the end.

In order to show that Mr. *Cooper* had, at the least, legal knowledge of the fraud, he observed upon certain letters, and particularly on one dated in October 1829, which had been signed by Mr. *Cooper* during Mr. *Brooks*'s absence from town, and also on entries in the books and accounts of the partnership relative to the transactions, and, especially, on the item in the account mentioned in the statement of this case. He then referred to the case of *Marsh* v. *Keating* (*m*), when it was before the House of Lords; and said: In that case a forgery had been committed by *Fauntleroy*, one of the partners in the house of *Marsh & Co.*; and his co-partners were held to be liable, notwithstanding they had no knowledge of the transaction: because they had the means of knowledge, and there was no principle of law upon which they could succeed in protecting themselves from responsibility in a case wherein, if actual knowledge were necessary, they might have acquired it by using the ordinary diligence which their calling required. Now, in the present case, we have conclusive evidence, as against Mr. *Cooper*, that there were in his power the means of becoming acquainted with the whole of the transactions to which the bill relates.

In *Longman* v. *Pole* a fraudulent act was committed by one of the partners in a firm, and his innocent co-partners were held to be liable, notwithstanding (as was the case also in *Marsh* v. *Keating*) not a shilling of the money acquired by the fraud ever came into their hands.

(*m*) 2 Cl. & Finn. 250.

Those cases therefore are stronger than the present: for Mr. *Cooper* participated in the benefit derived from the fraud.

In *Hern* v. *Nichols* (*n*) Lord *Holt* held that a merchant was responsible (civilly, though not criminally,) for a deceit practised by his factor on a third person. The principle of that case applies to the present; for one partner is the agent of another; and, if he commits a fraud in the course of employment by the partnership, the innocent partners are answerable for the consequences of that fraud. So in *Doe* v. *Martin* (*o*) a principal was held to be responsible for the fraud of his agent, although he did not personally take any part in the fraud. *Lovell* v. *Hicks* (*p*) is another remarkable instance in which an innocent partner was held responsible for the fraud or misrepresentation of his co-partner, notwithstanding he did not participate in the money acquired by the fraud.

It was said, by the *Solicitor-general*, that Messrs. *Brooks, Grane & Cooper* were not responsible to the Plaintiffs; because they were employed, not by the Plaintiffs, that is, the *cestuis que trust*, but by their trustees: but it would be most extraordinary if a solicitor who had dealt fraudulently with trust-money, could escape from the consequences of the fraud in a Court of Equity, by saying that the trustee and not the *cestui que trust* was his client. Messrs. *Brooks, Grane & Cooper* represented the trustees; and it was as much their duty, as it was the duty of the trustees, to protect the interest of the *cestuis que trust*: and, as they

(*n*) 1 Salk. 289. (*o*) 4 T. R. 39.
(*p*) 2 You. & Coll. 472.

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16th April.

have violated that duty, they, as well as the trustees, are responsible to the injured parties.

The VICE-CHANCELLOR *:

The substantial question in this case, is what ought to be done with respect to the 22,600*l.* obtained out of Court in 1830.

The Act of Parliament passed on the 24th of June 1822, vested part of the devised estates of Mr. *Barrett* in the Defendants *Branfill* and *Anthony Egerton Brydges*, in trust to sell, and directed the purchase-monies to be paid into this Court, and that, after payment of expenses, the surplus should be laid out, under the direction of the Court, in the purchase of tenements of freehold and inheritance in the county of *Kent*, to be vested in *Branfill* and *Brydges*, or the trustees for the time being of Mr. *Barrett*'s will, to the uses thereby declared. The Defendants *Brooks* and *Grane* were the solicitors who obtained the Act; and, from the time of its passing till the year 1825, they, and from the year 1825, they and their partner, the Defendant *Cooper*, acted as the solicitors of Colonel *Barrett* and the trustees, in all the numerous transactions that took place under the Act, of which the trustees must, in some degree at least, have been aware.

It appears that estates subject to mortgages were vested in Sir *Samuel E. Bridges* for life, with remainder in fee to Colonel *Barrett*. It is plain what the Colonel's views were when the Act had passed. In his letter to Sir *Samuel* of the 26th July 1822, he says: "The plan is to sell, and, when the money is in the Accountant-general's hands, for you to take it, if you choose, for the smallest portion of land to be settled in lieu: which

* The above is taken from his *Honor*'s written judgment.

can be done with the approbation of a *Master*; which will be managed by having as high a valuation as possible put upon any lands which you may choose to be so disposed of."

The substantial case stated in the bill, appears to be this: A formal agreement was drawn up, dated the 28th of July 1829, between Sir *Samuel* and the Colonel of the one part, and the Defendant *Quillinan* of the other part, whereby Sir *Samuel* and the Colonel agreed to sell, to *Quillinan*, several parcels of land for several sums amounting together to 4,596 *l.*, and certain other lands, for 3,000 *l.*; making together 7,596 *l.* All these subjects of the agreement were, in July 1829, in mortgage. Of those to be sold for 4,596 *l.*, Messrs. *Shepherd* and *Crozier* were the first mortgagees; and, of those to be sold for 3,000 *l.*, Mrs. *Whitby* was the first mortgagee. On the 30th of July 1829, *Westwood* made an affidavit that the lands and tenements therein mentioned, being those agreed to be sold for 4,596 *l.*, were worth 13,885 *l.*; and, on the same day, he made another affidavit that the lands therein mentioned, being those agreed to be sold for 3,000 *l.*, were worth 8,715 *l.*: the two sums of 13,885 *l.* and 8,715 *l.* making together 22,600 *l.*

On the 8th of December 1829, a state of facts and proposal was carried in, before *Master Dowdeswell*, by the partnership of *Brooks, Grane & Cooper*, whereby the trustees proposed to lay out 22,600 *l.*, part of the trust-monies arising under the Act, in the purchase, from *Quillinan*, of the lands and tenements mentioned in the schedule to the state of facts, being the same as were mentioned in the agreement and *Westwood*'s affidavits; and, on the 19th of December, those affidavits

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and also an affidavit sworn by Colonel *Barrett*, on the 17th of December, as to *Westwood*'s competency to survey and value lands, were carried in before the *Master*, together also with three abstracts professing to be abstracts of *Quillinan*'s title; and an affidavit sworn by Mr. *Josiah Wathen*, Messrs. *Brooks & Co.*'s clerk, on the same 19th of December. The abstracts were marked respectively A., B. and C. A. and C. related to those tenements of which *Shepherd* and *Crozier* were first mortgagees, and B. to those of which Mrs. *Whitby* was first mortgagee. Six of the deeds mentioned in abstract B., are the same as six mentioned in abstract A.; and seven deeds and a will mentioned in C., are the same as those mentioned in A.; and four of them are to be found in all the three abstracts; the conveyance to *Quillinan* being mentioned in all three, but not abstracted in the same way in all three.

What struck me upon reading these abstracts was this:—that no one can with certainty infer, from what appears on the three abstracts of the conveyance to *Quillinan*, what the whole consideration was. In abstract B., the agreement of the 28th of July is recited as an agreement to purchase the inheritance of, *inter alia*, the lands and hereditaments thereinafter secondly granted, for 7,596 *l.*; and it then represents the conveyance as a conveyance whereby, *inter alia*, in consideration of 3,000 *l.* certain lands were granted; but what the *alia* were, or what consideration affected them, or what lands were first granted, is not stated in abstract B. Abstract A. is in a different form from B., but in the same as C.: that is, both A. and C. recite the agreement as an agreement to purchase the lands and hereditaments thereinafter first granted, without stating the consideration; and both state the conveyance as a con-

veyance, *inter alia*, of certain lands for the considerations therein mentioned; but do not state what the considerations were.

It is quite consistent with what appears on the abstracts, that there might have been some other consideration besides the 7,596 *l.* If the deliberate purpose had been to conceal, from the *Master*, what the real consideration was, it is difficult to imagine what more effectual scheme, short of direct falsehood, could have been adopted than the making of the abstracts in the way in which we find them. The reasonable inference from what actually did take place, is that the *Master* was not aware what was the whole consideration for the conveyance to *Quillinan*: whereas, if the conveyance to *Quillinan* had been but once fully abstracted, the *Master* would have had his attention plainly directed to the whole consideration apparent on the deed, and would, in all probability, have required an explanation. The simple truth as far as the conveyance went, ought to have been stated clearly at least once. If it had been, then there would have been exemplified the force of what Mr. *Brooks* states in his letter to the Colonel, of the 24th July 1829: "The disproportion of prices between the buying and the selling being so very great as to attract attention when the title is examined, both now and on future occasions."

For the purpose of stating the whole conveyance to *Quillinan* fully and but once, either there should have been but one abstract comprising the three titles throughout; or if, as to their earlier part, they had been deduced in three abstracts, when they became blended, they should have been shown in one abstract. I observe that Mr. *Brooks*, in his letter to the Colonel, of

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the 1st of January 1830, says: "I could not spare Mr. *Wathen* (meaning, I presume, Mr. *Josiah Wathen*), and no other person understands the thing, and 'tis better they should not:" and I can conceive that Mr. *Josiah Wathen* was employed as being the most able conveyancing clerk in the office; and he may have sincerely thought that, to deduce the title by three abstracts, was better than by one; and that, in perusing the abstracts, he acted on his own judgment and without special directions from any one; which seems to be the result of his answer in chief to the 74th interrogatory, and his answer on cross-examination by *Brooks*. And I observe some slight inaccuracies in the abstracts; and it appears, on the depositions, that, at the time when Mr. *Josiah Wathen* made these abstracts, he was a very young man: and these circumstances do countenance the supposition that the abstracts were made without sufficient care, and without a design to mislead. And it certainly is possible and probable that they were made without a design to mislead; but if, in fact, they tended to mislead, and did mislead, by a suppression of truth, though without design, this Court will consider them as fraudulently made, and deal accordingly with the transaction of which they form a part. The abstracts being marked A., B. and C., the probability is that the *Master* would first read abstract A. Why should it have been marked A., unless it was intended that it should be read first? The earliest and most numerous title-deeds are not in abstract A., but in abstract B. Therefore such priority as the letter A. indicates, could not have been suggested by the deeds abstracted. But, as neither abstract A. nor abstract C. at all states the consideration of the conveyance to *Quillinan*, and abstract B. does in a certain manner state it, but not plainly or unequivocally, it seems to me that the read-

ing of abstract A. first, would tend to lull the *Master*'s vigilance, and turn his attention from the whole consideration said to be given by *Quillinan*. This also may have been undesigned. But, if so, it is remarkable that the abstracts should not only be made but be marked in the manner they are: especially when the schedule of deeds annexed to the affidavit of the 19th December 1829, commences with the deeds in abstract B.; so that, with more propriety, abstract B. should have been marked A. and *vice versa*.

Then, by the affidavit sworn on the 19th of December 1829, it was stated that the abstracts contain: "true and faithful abstracts of the deeds, muniments, and evidences of title mentioned in the schedule to the affidavit, so far as the same respectively relate to the lands comprised in the abstracts, and to which a title is hereby professed to be shown." The indentures of lease and release, of the 29th and 30th of December 1829, being the conveyance to *Quillinan*, had been executed by Sir *Samuel* and the Colonel, and they are introduced into the abstract in this way. In the margin is written, 1829, without day or month: "originals produced and examined;" and, at the end, in each abstract, the statement is: "duly executed and attested, and receipts for consideration-money indorsed and witnessed." Mrs. *Whitby* is a most important party to those indentures: and Colonel *D'Arcy*, one of the attesting witnesses to her execution, has proved, most distinctly with respect to the month and the day, though he made an obvious error as to the year, that she did not execute before the 29th of January 1830; and there is nothing to impugn his testimony. In that respect, therefore, the affidavit of the 19th December is untrue. It also appears, from the copy of the

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release, that there was no receipt for any consideration indorsed. In that respect also the affidavit is untrue.

It is a fact that, on the 18th January 1830, the *Master* signed, on each abstract, a memorandum that he approved of the title; yet, on the 8th January 1830, a report approving of the proposed sale to the trustees and of *Quillinan*'s title, was procured from the *Master*. That could hardly be accurate, and it remains unexplained. I observe that Mr. *Brooks*, in his letter to *Master Dowdeswell* of the 5th of January 1830, says: "The *Vice-Chancellor* sits on Friday next: on which day or the next, I hope, with your obliging assistance, to mention the matter." According to Colonel *D'Arcy*'s evidence and the calendar, Friday was the 8th of January; and, in his letter of the 6th, *Brooks* says: "Under these circumstances, probably I may not be premature (as the time presses) in stating your opinion as in favour of the whole title." I conjecture that Mr. *Brooks* did allow himself to anticipate what had not happened, but did afterwards happen; and, acting upon that anticipation, did, somehow or other, procure the report of the 8th of January. On the same day he caused a petition to be presented in the names of *Branfill* and *Brydges*, the trustees of the Act; and, on the 12th of January, an order was made, on that petition, confirming the report of the 8th, and directing that the *Master* should settle a conveyance, and that certain exchequer bills should be sold, and that certain costs should be paid, and that, upon the *Master*'s certifying the due execution of the conveyance, payment should be made to *Quillinan*. On the 15th of January 1830, a report was procured that the *Master* had approved of the conveyance. It is remarkable that the draft conveyance from *Quilli-*

nan was approved of by counsel on the 15th January; and, in the spirit of anticipation which seems to have pervaded the whole of this part of the transaction, it probably was assumed that the *Master* would approve of what counsel had approved of, and that therefore the report might properly be obtained, as in fact it was, on the 15th; though it appears, by the *Master*'s signature on the fair copy of the draft, that he approved of it on the 21st January: so that the report of the *Master*'s approval of the conveyance, was dated three days before his approval of the title, and six days before his approval of the draft of the conveyance.

On the 21st of January, a petition was presented in the names of the trustees of the Act, stating, with glaring inaccuracy, as appears by the office copy of the order, that the *Master* by his report of the 23d of January, that is two days after the petition was presented, had certified that the conveyances had been duly executed, and praying an order for payment to *Quillinan*. This is remarkable; because, on the 23d of January, *Brooks* wrote to the Colonel as follows: "We can bespeak nothing at the Accountant-general's till he (meaning the *Master*) has certified." This shows that *Brooks*, on the 23d, clearly knew that the *Master* had not certified. However, upon that last petition, on the 25th of January, counsel attending for the petitioners and Colonel *Barrett*, an order was made as prayed. On the 26th of January the *Master* reported that the deeds of conveyance had been duly executed by all proper parties: which report was founded upon an affidavit sworn the same day.

The release was dated the 21st of January, and was executed by *Quillinan*, Colonel *Barrett*, and both the

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trustees of the Act: all of whom, by executing the conveyance, adopted the transaction. Under a power of attorney from *Quillinan* to *Brooks*, dated the 28th of January 1830, *Brooks* received, from the Accountant-general, on the 28th of January, 18,564*l.* 1*s.* 10*d.*, and, on the 4th of February, 4,035*l.* 18*s.* 2*d.*, making together 22,600*l.*

All this machinery of agreement, affidavits, abstracts and petitions, as well as the conveyances to *Quillinan*, and from him to the trustees of the Act, emanated from the office of *Brooks, Grane & Cooper*, with more or less of privity on the part of Sir *Samuel Brydges*, Colonel *Barrett*, *Quillinan* and the two trustees. The release from *Quillinan* to the trustees states the reports of the 8th and 15th January and the order of the 12th, and professes to be made in pursuance of that order, and of the report dated the 15th.

Now, upon this state of things, putting out of view all mere inaccuracies and irregularities, and all suspicion of design where none may, in fact, have existed, is it not plain that the *Master* and the Court were deceived by positive misrepresentation? Unless the *Master* had been induced to believe that Mrs. *Whitby* had executed the indenture of 30th December 1829, he could not have approved of the title.

Now, considering the vast quantity of property confided to the care of the Court, it is the bounden duty of the Court to require that the statements upon which it acts, shall be strictly true. I do not here enter into the question how far the misrepresentation was wilful. I am willing to suppose that Mr. *Josiah Wathen*, being then a very young man, and believing that all was right or

would be right, and that it was his duty to expedite the matter in hand, prepared the abstracts and made his affidavit in the manner I have stated, without sufficient reflection. But the Court was deceived by false representation: and, on that ground, it is my clear opinion that all the parties to the transaction, Sir *Samuel Brydges*, Colonel *Barrett*, *Quillinan*, the two trustees and Messrs. *Brooks*, *Grane & Cooper*, became answerable, to the Court, for, at least, so much of the 22,600 *l.* as was not applied to lawful purposes.

Upon general principles with respect to liability, I cannot distinguish Mr. *Cooper* or Mr. *Grane* from Mr. *Brooks*. They were all of them solicitors and officers of the Court; and the Court cannot regard any division of labour as among themselves, but must look upon the act of the partnership towards the Court, as the act of all and every of them. The safety of the public requires this. Of the 22,600 *l.*, 7,596 *l.* was paid to or for the benefit of the mortgagees; which was right at all events. The remainder was applied to various purposes for the benefit of the parties to the transaction.

Then the great question in the cause arises: whether the 22,600 *l.* was fairly obtained from the Court, or, in other words, whether the tenements sold to the trustees were really worth 22,600 *l.* The Plaintiffs allege that the real value did not amount to 7,596 *l.* *Brooks*, by his answer, says they greatly exceeded 7,596 *l.* *Branfill*, by his answer, leaves it to be inferred that they were worth 10,514 *l.* 10 *s.*—[His *Honor* here stated the valuations of the surveyors who had been examined in the cause. They differed, materially, in their estimates.] —This is not very satisfactory evidence; but it induces

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me to think that 22,600*l.* was by no means the fair value of the lands conveyed to the trustees of the Act; and I have not the slightest doubt, if it shall turn out that the purchase was not worth 22,600*l.*, that a fraud was practised upon the Court, and that Sir *Samuel Brydges*, the Colonel, and *Brooks* contrived it, and that they became responsible for it; that is, so far as the value shall turn out to be less than 22,600*l.*

Mr. *Quillinan* took an active part in the transaction. It seems, from what he states in his answer, that he must have known that he was taking on himself a false character. I do not impute to him any knowledge of the fraud, or any wish to defraud; he acted thoughtlessly out of kindness to his brother-in-law. But, without his concurrence, the transaction could not have been managed as it was; therefore he is responsible.

The trustees of the Act, though innocent of fraud, are responsible; for it was their duty to have ascertained what was going on under their names by their permission. Instead of which, it does not appear that they ever made any inquiry or exercised any caution, but took for granted that all was right, when the least inquiry would have shown that all was wrong.

For the reasons before assigned, I think Mr. *Grane* and Mr. *Cooper* are personally responsible. But, upon reading the whole of the correspondence, and attending to what is stated, in the answers and in the evidence, as to the course of business pursued in their office, I do not think that it is at all established that Mr. *Grane* or Mr. *Cooper* (though they must have had some knowledge that a transaction was going on) had the least knowledge or suspicion that it was a fraudulent trans-

action or of the circumstances that constituted the fraud until long after it was completed. So that I consider the moral characters of those two gentlemen to be unaffected by the transaction.

With respect to Mr. *Brooks*, the correspondence shows that he entered unwillingly into the transaction. He seems to have allowed himself to be overborne against his better judgment, by the importunity of his client, Colonel *Barrett*, and the view of his distressed circumstances. His letters are full of affectionate regard towards Colonel *Barrett*, and show that he preferred the Colonel's views to his own.

The substantial ground for relief is the fraud in the excessive price. The bill asks, alternatively, to set aside the transaction altogether, or to have relief by restitution of the excess of the price above the value. It seems to me considerable difficulty would arise from setting aside the whole transaction: but the relief should rather be to have that money made good to the trust-estate which was improperly taken out of Court. To a certain extent, the decree must be in the nature of an inquiry, and hypothetical; because I have not sufficient evidence to show what was the proper price to have been paid for the lands purchased. I think, therefore, that all I can do at present, is to refer it to *Master Dowdeswell*, to inquire what, on the 8th day of January 1830, was a fit and proper price to have been given by the Defendants *Branfill* and *Anthony Egerton Brydges*, for the purchase of the lands sold and conveyed to them for the sum of 22,600 *l.*; and in case it shall appear that a less sum than 22,600 *l.* was a fit and proper price to have been given, then I declare that the Defendants *Branfill*, *Anthony Egerton Brydges*,

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Quillinan, Brooks, Grane & Cooper, and the personal assets of Sir *Samuel Bridges* and Colonel *Barrett* are jointly and severally liable to make good the loss to the trust-estate occasioned by paying the sum of 22,600 *l.* instead of the proper price.

IN RE THOMSON.

1841: 12th Nov.

Mortgagor and Mortgagee. Heir. Construction. Stat. 11 *Geo.* 4 *&* 1 *Will.* 4, *s.* 8, *and* 4 *&* 5 *Will.* 4, *c.* 23, *s.* 2.

The 8th sect. of 11 Geo. 4 & 1 Will. 4, as expounded by the 2d sect. of 4 & 5 Will. 4, c. 23, applies to the case of the heir of a mortgagee being out of the jurisdiction of the Court.

THIS was a petition praying that some person might be appointed, by the Court, to convey a mortgaged estate, in the place of the heir of the mortgagee, who was out of the jurisdiction of the Court*.

Mr. *Younge* appeared in support of the petition, and said that the heir was known, but was out of the jurisdiction; and that the question was whether the case was within 11th Geo. 4 & 1 Will. 4, c. 60, s. 8. He referred to *Ex parte Whitton* (*a*) and to 4th & 5th Will. 4, c. 23, s. 2, which enacts that: "where any person seised of any land upon any trust or by way of mortgage dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land, in like manner as is provided by the Act of the 11th year of King George the 4th and the 1st year of his present Majesty, intituled an Act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, and for enabling Courts of Equity to give effect to their decrees and

* *See* 11 Geo. 4 & 1 Will. 4, c. 60, s. 8.

(*a*) 1 Keen, 278.

orders in certain cases, in case such trustee or mortgagee had left an heir, and it was not known who was such heir; and such conveyance shall be as effectual as if there was such heir."

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The VICE-CHANCELLOR:

The 8th section of 11 Geo. 4 & 1 Will. 4, applies to a case where a person seised of land is out of the jurisdiction of the Court; and, according to Lord *Langdale's* decision in *Ex parte Whitton*, that section does, by the operation of 4th & 5th Will. 4, c. 23, s. 2, apply to the case of a mortgagee. Now here we have a mortgagee who is out of the jurisdiction; and according to the statutory construction which the 4th & 5th Will. 4, c. 23, has put upon the 8th section of 11 Geo. 4 & 1 Will. 4, c. 60, the case is within that section: and, therefore, you may take your order *.

* See *In re Stanley*, *ante*, Vol. VII. p. 170; and *In re Williams*, *ante*, Vol. IX. p. 642.

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12th Nov.

PYM *v.* LOCKYER.

Alienation (restraint of). Forfeiture. Vesting order. Insolvent.

The dividends of a fund, were directed to be paid to *A.* for life; but if he assigned or otherwise disposed of them, they were to go over. *A.* being in prison, and charged in execution for debt, the creditor obtained an order, under 1 & 2 Vict. c. 110, s. 36, vesting all his property in the provisional assignee of the Insolvent Debtors' Court. Held that the dividends of the fund did not go over, but vested in the assignee.

THE testator in this cause, by his will dated the 11th of July 1823, directed the trustees to invest 5,000*l.* in the funds, and, after his grandson, *Edmund Lockyer Pym*, should have attained 21, to pay the dividends: "Into the hands only of the said *E. L. Pym* during his life, or until such forfeiture by him as hereinafter mentioned, and whose receipts alone shall be required as good and necessary discharges for the same: hereby willing that the said dividends and interest or any part thereof, shall not be assignable or assigned by him or otherwise disposed of by him in any manner by anticipation, on pain of forfeiture to go as hereinafter mentioned; meaning the said dividends and interest to be for his sole and personal use and benefit only: and from and after the decease of the said *E. L. Pym*, or such forfeiture by him as aforesaid, and subject to the trusts aforesaid, then upon trust that my said trustees shall stand possessed of the said stocks, funds, and securities, and the interest and dividends thereof, in trust for the use and benefit of all and every the children of the said *E. L. Pym*."

In September 1839, *E. L. Pym* being in prison and charged in execution for debt, the creditor at whose suit he had been committed, obtained an order under the 36th sect. of 1 & 2 Vict. c. 110 (for abolishing arrest on mesne process, &c.), vesting his real and personal estate and effects in the provisional assignee of the Insolvent Debtors' Court.

The question was whether *Pym*'s interest under the will was forfeited, or whether it was vested in the assignee.

Mr. *Bethell* and Mr. *West* appeared for the trustees of the will.

Mr. *Wakefield* and Mr. *Bacon*, for the assignee, said that the language of the will applied, not to a hostile and compulsory process by means of which *E. L. Pym* might be deprived of the provision thereby made for him, but to an assignment or disposition of it by his own, voluntary act: that, as the law stood at the time of the testator's death, the taking of the benefit of the Insolvent Debtors' Act must be the voluntary act of the prisoner; but, under the 36th sect. of the late Act, the creditor at whose suit he was in custody, might *compel* him, after he had been in gaol for 21 days, to take the benefit of the Act: consequently, the vesting order, although it had deprived *Pym* of the personal use and benefit of the provision, had not caused a forfeiture of it. They cited *Lear* v. *Leggett* (*a*) as applying, in principle, to the present case; because the obtaining of the vesting order in the present case, was as much an act done *in invitum*, as the taking out of the commission of bankruptcy was in the case cited.

Mr. *G. Richards* and Mr. *Chandless*, for the children of *E. L. Pym*, relied on the language of the will, and said that the Court would disappoint the clear intention of the testator, if it held that the dividends of the stock were payable to the assignee; for then the assignee's, and not *Pym*'s, receipts would be required as

(*a*) *Ante*, Vol. II. p. 479.

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PYM v. LOCKYER.

good and necessary discharges for the same: that it was impossible for any one to express, more strongly than the testator had done, that the dividends should be paid to his grandson, for the sole and personal benefit of his grandson; and that if, from any cause whatever, they could not be so paid any longer, then that they should go over to the children of his grandson: that, in *Lear* v. *Leggett*, the words of the proviso were not nearly so strong as those used by the testator in this case; for there was no direction that the receipts of the legatee alone, should be required as good and necessary discharges, nor was it declared that the provision should be for the sole and personal use and benefit only of the legatee.

In *Shee* v. *Hale* (*b*) the annuitant, who was restrained from alienation, took the benefit of the Insolvent Debtors' Act which was then in force, and it was held that the annuity did not vest in his assignee, but fell into the residue. The language of the *Master of the Rolls*, in giving judgment in that case, is material to show that it is the intention of the testator that is to govern in cases like the present. The case of *Cooper* v. *Wyatt* (*c*), which your *Honor* followed when you decided *Lear* v. *Leggett*, is very strong in favour of our clients. The words of the will in that case corresponded, very nearly, with the words of the will in this case. There the legatee became bankrupt, and it was held that his interest did not vest in his assignees, but ceased for the benefit of his children.

At the time when the will was made and at the testator's death, the old Insolvent Debtors' Act was in force;

(*b*) 13 Ves. 404. (*c*) 5 Madd. 482.

and the will must be construed with reference to the law as it then existed: and as, if *Pym* had taken the benefit of the former Act, the trust for him would have ceased, and the trust for his children have taken effect, the Court must hold the same consequence to follow from his taking the benefit of the present Act: otherwise, it would construe the will according to an *ex post facto* law.

The VICE-CHANCELLOR:

I am clearly of opinion that the assignee of *Pym* is entitled to the interest of the fund.

This case is quite unlike that of *Cooper* v. *Wyatt*; for there, the trustees were directed to pay the overplus of the rents, issues and profits into the hands of the testator's nephew, *but not to his assignees.* Here there is no such direction, but the trust is to pay the dividends "into the hands only of *E. L. Pym* during his life, or until such forfeiture by him as hereinafter mentioned, and whose receipts alone shall be required as good and necessary discharges for the same: hereby willing that the said dividends and interest, or any part thereof, shall not be assignable or assigned by him, the said *E. L. Pym*, or otherwise disposed of by him in any manner by anticipation, on pain of forfeiture to go as hereinafter mentioned; meaning the said dividends and interest to be for his sole and personal use and benefit only."

Then what are the facts of this case? No voluntary act has been done by *E. L. Pym* by which his interest in the fund has become forfeited; but, under the provisions of a recent Act of Parliament (which I admit the testator could not foresee, and, therefore, could not pro-

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vide against), *Pym*'s property has been taken from him by operation of law and without his concurrence, and his assignee has become entitled to it.

JOLLIFFE *v.* HECTOR.

1841:
15th Nov.

Principal and agent. Account. Just allowances. Solicitor and client.

In a suit by a principal against his steward and agent, the decree, in conformity to the prayer of the bill, directed an account to be taken of rents, profits and timber-money received, by the Defendant on the Plaintiff's account; and also directed the *Master*, in taking the accounts, to make to the parties all just allowances. The Defendant was a solicitor, and had acted, as such, for the Plaintiff, during his stewardship; and bills of costs were due to him from the Plaintiff. The *Master*, at the Plaintiff's request, taxed the bills, and, in taking the accounts under the decree, included the reduced amounts of them amongst the just allowances to which the Defendant was entitled. The Plaintiff excepted to the report on that account: and the Court allowed the exceptions.

THE Plaintiff, a gentleman of landed property, had employed the Defendant to act as his agent in the management of his estates. The bill prayed that an account might be taken of the sums which the Defendant had received as such agent, and that the Defendant might be decreed to deliver up, to the Plaintiff, all deeds, documents, papers and writings, in his possession or power, which belonged to the Plaintiff. The decree directed the accounts to be taken, and the *Master* to make, to the parties, all *just allowances*.

The Defendant was a solicitor, and had been employed by the Plaintiff in that capacity during the period that he had acted as the Plaintiff's agent; and, several bills of costs having become due to him from the Plaintiff, the *Master*, on the application of the Plaintiff's solicitor, referred those bills to a clerk in Court, for taxation; and, in taking the accounts directed by the decree, he included the reduced amounts of the

bills amongst the just allowances to be made to the Defendant. The Plaintiff excepted to the report, because the *Master* had allowed the Defendant the reduced amounts of his bills.

Mr. *G. Richards* and Mr. *Parry*, in support of the exceptions.

Mr. *Bethell* and Mr. *Briggs*, in support of the report, said that, if a client applied to have his solicitor's bills taxed, he undertook to pay them; and that the Plaintiff could not get his deeds &c. out of the hands of the Defendant, until he had paid his bills.

The VICE-CHANCELLOR, after referring to the pleadings and decree, said:

The bill states that the Defendant did act as the Plaintiff's solicitor; but I do not see, either in the bill or in the answer, any statement that any bills of costs were due from the Plaintiff to the Defendant. The bill is framed for an account of the rents and profits of the Plaintiff's estates, and of the monies produced by the sale of timber on those estates, which had been received by the Defendant: and the Defendant does not, by his answer, make any claim in respect of bills of costs: there is no passage in the answer to that effect. The decree directs the *Master* to take an account of the rents, profits, and timber-money received by the Defendant: but it does not order the *Master* to tax any bills of costs. Therefore, under the direction to make the Defendant just allowances, it was not competent to the *Master* to tax the Defendant's bills, and to allow him the amounts.

Consequently I cannot allow the report to stand.

1841: 19th Nov.

Petition, service of. Stat. 3 & 4 Vict. c. 55.

A petition presented under 3 & 4 Vict. c. 55, by a tenant for life of settled estates, for leave to drain the estates, ordered to be served on the trustees to preserve contingent remainders, the person beneficially entitled to the first vested estate of inheritance being an infant.

IN the Matter of 3 & 4 Vict., c. 55 (to enable the owners of settled estates to defray the expense of draining the same, by way of mortgage).

Ex parte DERING.

THE Act of Parliament above mentioned empowers any tenant for life or for a term determinable upon his or her life, under any will, settlement or other like disposition, entitled in possession, at law or in equity, to any lands in *England* or *Ireland*, or the guardian or guardians of any infant, on the behalf of such infant so entitled as aforesaid, to apply, by petition, to the Court of Chancery or Exchequer in *England* or *Ireland*, for leave to make any permanent improvements in the lands to which he or she shall be so entitled, by draining the same in a permanent manner; sect. 1: Provided that a copy of every such petition shall be served, 21 days at the least before the hearing thereof, upon the person or persons beneficially entitled at law or in equity, to the first vested estate of freehold of inheritance in remainder after the estate of the tenant for life; but, if any such persons shall be of unsound mind or under the age of 21 years, or under any other legal disability, or beyond the limits of the United Kingdom, then a copy of such petition shall be served, on his, her or their behalf, upon such person or persons respectively as the Court of Chancery or Exchequer, to which the petition shall be preferred, shall appoint for that purpose; sect. 2: And when the improvements have been made and sanctioned by the Court, the *Master* may authorize the tenant for life &c. to charge the estates

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Ex parte DERING.

with the payment, to any person willing to advance the same, of the amount of the sums expended, together with interest at five per cent; sect. 4.

Sir *Edward Dering*, the tenant for life of certain settled estates, in which his eldest son, an infant, was entitled to the first vested estate of freehold of inheritance in remainder, having presented a petition under the Act;

Mr. *Bloxam*, on his behalf, applied to the Court, to appoint a person on whom the petition might be served on the infant's behalf.

The *Vice-Chancellor* directed the petition to be served on the trustees of the estates to preserve contingent remainders.

1841:
19th Nov.

Statute of Limitations, 3 & 4 *Will.* 4, *c.* 27. *Acknowledgment. Mortgagor and mortgagee. Equity of redemption. Agent.*

HANNAH MARIA TRULOCK *v.* JOHN ROBEY.

IN December 1767, *Richard Hutchins*, the Plaintiff's great-grandfather, made a mortgage in fee of a copyhold estate, held of the manor of *East Hendred* in *Berkshire*. In October 1774, the mortgage was transferred to *John Robey*, the elder; and, soon afterwards, he was admitted to and entered into possession of the mortgaged premises, and continued in possession of them until his death.

Hutchins, the mortgagor, died in 1776; and the equity of redemption of the mortgaged premises, descended to his three daughters, *Ellen*, *Hannah*, and *Mary*. *Ellen* afterwards died intestate and without issue, leaving her sisters, *Mary* and *Hannah*, her customary coheirs. In October 1804, *Hannah* sold and surrendered her moiety of the equity of redemption to *John Robey*, the elder, in fee. *Mary* married *John Trulock*, the elder, and died in 1778, leaving her son, *John Trulock*, the younger, her customary heir. *John Trulock*, the younger, died in 1811, leaving the Plaintiff, who was then about four years old, his only child and customary heir. In December 1837, *John Trulock*, the elder, died.

A mortgagee in possession of lands at *Hendred*, having received from the grandfather of the infant heir of the mortgagee, a letter, the contents of which did not appear, wrote in answer as follows: "Concerning the business at *Hendred*, which you know nearly as well as myself, as there has been nothing kept from you; which I am very willing to settle if your grand-daughter is of age. I never told you any otherways; as I have been informed she is the heiress of what there is. The difference is not worth much. I shall hear from your grand-daughter about the business." Held that the last-mentioned letter was an acknowledgment of the heir's right to redeem the mortgage, and that, when she came of age, she was entitled to consider her grandfather as having acted as her agent, and, consequently, that she was entitled to redeem the mortgage at any time within 20 years after the letter was written.

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John Robey, the elder, died some time before the 31st of October 1817; and, on or about that day, the Defendant was admitted to the mortgaged premises either as the devisee or heir of his father; and he then entered into and had ever since continued in the possession of the mortgaged premises.

The bill was filed on the 9th of May 1838, praying, amongst other things, that the Plaintiff might be declared to be entitled to redeem one moiety of the mortgaged premises. It charged that the Defendant, in a letter written by him to the Plaintiff's grandfather, in or about the month of November 1821, in reply to a letter from the Plaintiff's grandfather, admitted the Plaintiff's title to the equity of redemption in a moiety of the mortgaged premises, and stated that he was willing to settle accounts as to the mortgaged premises, when the Plaintiff should attain her full age. The letter alluded to, in the above charge, as containing an admission of the Plaintiff's title, was dated, "*Hendred*, 30th of November 1821," and was as follows: "Sir, Having received a letter dated the 17th of November, after a week's turn round the country on expense, I think you might send letter with less expense. Concerning the business at *Hendred*, which you know nearly as well as myself, as there has been nothing kept from you: which I am very willing to settle if your grand-daughter is of age. I never told you any otherways; as I have been informed she is the heiress of what there is. As for Chancery, I think there is no good there. The difference is not worth much. I shall hear from your grand-daughter about the business. *J. Robey.*"

The question, at the hearing of the cause, was whether that letter prevented the Plaintiff's right to redeem

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from being barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27; that is whether it was: "an acknowledgment of the title of the mortgagor or of his right of redemption, given to the *agent* of the *mortgagor* or some person claiming his estate, in writing, signed by the mortgagee or the person claiming through him:" sect. 28.

The direction and contents of the letter and the signature to it, were proved to be in the handwriting of the Defendant; and *J. Trulock*'s daughter deposed that she received it from the *East Hendred* carrier, for her father, who was then confined for debt in *Reading* gaol.

Mr. *Stuart* and Mr. *Koe*, for the Plaintiff, contended that the letter contained a sufficient acknowledgment of the Plaintiff's right to redeem the mortgaged premises, and referred to the judgment in *Reeks* v. *Postlethwaite* (*a*).

Mr. *Wakefield* and Mr. *Randell*, for the Defendant, said first, that the language of the letter was so vague, that it did not distinctly appear to have any reference to the mortgaged premises; and, secondly, that there was no evidence, nor was it even alleged by the bill, that *John Trulock*, the elder, was the agent of the Plaintiff, or even that he had assumed to act as such.

The VICE-CHANCELLOR:

I think that the Plaintiff has a right to redeem the mortgaged property.

The question is what is the fair construction of the letter of the 30th of November 1821, and what effect

(*a*) Cooper's C. C. 164.

ought to be given to it, having regard to the Statute of Limitations. Now the language of the statute is: "that when a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within 20 years next after the time at which the mortgagee obtained such possession or receipt, unless, in the meantime, an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and, in such case, no such suit shall be brought but within 20 years next after the time at which such acknowledgment or the last of such acknowledgments, if more than one, was given." Now, *John Robey* the elder was in possession of the estate, and had been in possession of it ever since 1774. In 1804 he purchased one moiety of the equity of redemption. Then, with respect to the other moiety, the case was this. *Mary*, who was the owner of the other moiety of the equity of redemption when it first became divided into moieties, died in 1778, leaving a son. He died in 1811 and left the Plaintiff his heir. The Plaintiff was born in 1807, and, consequently, she was only four years old when her father died. *John Trulock*, the husband of *Mary* and the grandfather of the Plaintiff, survived his wife, and became entitled to her moiety of the estate, subject to the mortgage, as tenant by the curtesy. He died in December 1837. The grandfather, being entitled as tenant by the curtesy and the Plaintiff being the owner of one moiety of the equity of redemption, the grandfather wrote some letter to the Defendant which does not appear. The Defendant

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wrote, in answer, the letter of the 30th of November 1821. But first, I must observe that the mortgaged estate was situate in the parish of *Hendred*. In that letter he says: "Concerning the business at *Hendred*, which you know nearly as well as myself." So that the writer assumes that the person whom he was addressing knew nearly as much of the matter as he did himself. Then he says: "which I am very willing to settle if your grand-daughter is of age." Now what was the matter which he was willing to settle? There could be but one matter to settle, namely, that which might arise in consequence of the grand-daughter being entitled to a moiety of the equity of redemption. He then says: "I never told you any otherways; as I have been informed she is the heiress of what there is." That is an admission that the grand-daughter was the heiress of what there was, that is, of that portion of the equity of redemption which had not been purchased by *John Robey* the elder.

It appears to me that the Court, being in possession of the circumstances of the case, must construe the letter in the way in which the writer intended it to be construed by the person to whom it was addressed: and I think that it is an acknowledgment, by the Defendant, that the Plaintiff *Hannah Maria Trulock*, was entitled to one moiety of the equity of redemption: it is not capable of any other construction.

Then it was objected that, as the letter was not written either to the grand-daughter or to a person authorized to act as her agent, it was not such a written acknowledgment as the statute requires. The question however is whether the party who wrote the letter, did not treat the party to whom it was written as the

agent of the child. She was at that time an infant; and the writer made the statements, in his letter, in answer to the grandfather's letter upon the infant's business: and, when he said: "I am very willing to settle if your grand-daughter is of age," can it be supposed that that was not meant to be a statement of which the grand-daughter might avail herself, when she came of age? It would be a forced construction to say that this was not an acknowledgment within the statute, or that it was not given to the agent of the person claiming the estate of the mortgagor. It is not necessary to make a person an agent, that he should have an actual authority to act. It is quite sufficient that the grandfather acted as the agent of his grandchild; and that she, when she came of age, adopted what he had done on her behalf. The letter too treats the grandfather as agent: it assumes that he had full knowledge of all the circumstances relating to the property: and, in my opinion, the expressions in it, do, in effect, admit the right in dispute. Consequently I shall make a decree to redeem, in the usual form where the Defendant is a mortgagee in possession.

1841:
25th Nov.
and
9th Dec.

Contempt.
Practice.
Process.
Construction of
11 *Geo.* 4 *&*
1 *Will.* 4, *c.* 36,
rule 5.

COLLEY *v.* CANDLER.

THE Defendant being in custody under an attachment for want of answer, a *habeas corpus*, returnable on the 2d of November 1841, was issued for bringing him to the bar of the Court. On the 4th of November he was brought to the bar of the Court, and was then turned over to the Fleet.

Mr. *Fisher* now moved to discharge the Defendant out of custody, on the ground that he had not been brought to the bar of the Court until after the *habeas corpus* had expired, and, consequently, had not been brought there by *habeas corpus*, as required by 11th Geo. 4 & 1 Will. 4, c. 36, rule 5, which directs that, if the Defendant under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the Court under process to answer his contempt, the Plaintiff, if the contempt be not sooner cleared, shall bring the Defendant, *by an habeas corpus*, to the bar of the Court, within 30 days from the time of his being actually in custody or detained (being already in custody) upon process of contempt; and, if the last day of such 30 days shall happen out of term, then *within the first four days* of the ensuing term: and, in case any such Defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, gaoler &c.

The 5th rule of 11 Geo. 4 & 1 Will. 4, c. 36, directs that where a Defendant is in custody for a contempt in not answering, the Plaintiff shall bring him, by *habeas corpus*, to the bar of the Court within a certain specified time, and that, in case he shall not be brought up within that time, he shall be discharged out of custody. A *habeas corpus* for bringing up a Defendant, expired before he was brought up: but he was brought up within the time prescribed, and was then committed to the Fleet. Held that the committal was regular.

in whose custody he shall be, shall thereupon discharge him out of custody, without payment by him of the costs of the contempt. *Greening* v. *Greening* (*a*).

Mr. *Cooper*, contra.

The VICE-CHANCELLOR:

The rule says that in case any Defendant shall not be brought to the bar of the Court *within the respective times aforesaid*, he shall be discharged: it does not say that in case he shall not be brought up by *habeas corpus*, he shall be discharged; but it merely prescribes the time within which he shall be brought up, which, in this case, was within the four first days of Michaelmas term: and, as he was brought up within that time, the order sought to be discharged was right.

Motion refused.

(*a*) 1 Beav. 121.

1841:
4th December.

HERRING *v.* CLOBERY.

Contempt. Decree (staying proceedings under).

A Plaintiff, whose bill had been dismissed with costs at the hearing, appealed from the decree before any steps had been taken to compel him to pay the costs; the Court however refused an application made by him, to stay the execution of the decree.

If a party who has appealed from a decree, wishes to stay the execution of it, he ought to apply to the Court, as speedily as possible.

A party against whom a decree had been made with costs, appealed from it; and, afterwards, moved to stay the execution of it. The Court allowed the motion to proceed, notwithstanding the party was in contempt for non-payment of the costs.

The Court refused to discharge a Plaintiff, who was in custody for a contempt in not paying costs which he had been decreed to pay, notwithstanding he had appealed from the decree, and deposed that it was of the greatest importance to him, and to an infant Co-plaintiff (his daughter), that he should have his personal liberty to enable him to prosecute the appeal, and to instruct his counsel and solicitor, and otherwise to assist in the conduct of it.

BY the decree made at the hearing of this cause, on the 15th of December 1840, the bill was dismissed with costs. On the 13th of April 1841, the Plaintiff presented a petition of appeal from the decree. On the 25th of that month, the Defendants' bills of costs were left with the *Master*, for taxation; and, on the 10th of May, those bills were taxed at 846 *l.* On the 5th of June, the Plaintiff was taken on an attachment for non-payment of the 846 *l.*; and, on the 12th, he was brought to the bar of the Court and turned over to the Fleet. A few days afterwards, attachments were left, with the warden of the Fleet, for costs due, from the Plaintiff, under orders in the cause.

On the 29th of November, the Plaintiff served a notice of motion that he might be discharged out of the custody of the warden of the Fleet; and that process of contempt upon the several attachments issued against him, at the instance of the Defendants, for non-payment of costs, might be stayed until after his petition of appeal should have been heard.

The motion was supported by an affidavit, made by the Plaintiff, stating that it was of the utmost importance to him and to the interests of his daughter, the infant Co-plaintiff in the cause, that he should have his personal liberty, to enable him to prosecute his appeal, and to instruct his counsel and solicitor, and otherwise to assist in the conduct thereof.

Mr. *G. Richards* and Mr. *Wright*, for the Defendants, said that, whatever might be the grounds on which the Plaintiff sought to be discharged without clearing his contempt in not paying the costs of the suit, he could not be heard at all until the prior costs had been paid.

Mr. *Romilly* and Mr. *Loftus Wigram*, for the Plaintiff, submitted to the objection: and the costs incurred prior to the decree, were paid, in Court, by some person on the Plaintiff's behalf.

Mr. *Romilly* and Mr. *L. Wigram*, then proceeded with their motion. They cited *King* v. *Bryant* (*a*), *Wilson* v. *Bates* (*b*), *Ricketts* v. *Mornington* (*c*), *Meade* v. *Norbury* (*d*), and *Gwynn* v. *Lethbridge* (*e*). But they relied principally upon Lord *Eldon*'s judgment in *Roberts* v. *Totty* (*f*), where his Lordship says: "In a case that occurred yesterday, on a motion to discharge proceedings for irregularity, the appeal was lodged *before any proceeding for the costs had been commenced*; and the distinction taken, by Mr. *Newland*, between appeals presented *before* and after a step taken for the costs, appeared to me to be very sensible. There would be danger in going to this extent, that an appeal lodged

(*a*) 3 Myl. & Craig, 191.
(*b*) Ibid. 197.
(*c*) *Ante*, Vol. VII. p. 200.
(*d*) 4 Price, 322.
(*e*) 14 Ves. 585.
(*f*) 19 Ves. 446.

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after a party had begun to pursue his remedies for costs, perhaps with the very object of preventing the payment of those costs, should stay the proceeding for them." They added that the Plaintiff, in case the Court should think proper to discharge him, was ready to give security for surrendering himself, if his petition of appeal should be dismissed.

The VICE-CHANCELLOR:

I cannot grant this application: for, in the first place, it is not a rule of this Court to interfere, as a matter of course, to stay the proceedings under a decree, merely because it is appealed from; and, in the next place, it is by no means the practice of the Court to interpose in order to stay a proceeding the only object of which is to compel the payment of costs. Here the bill was dismissed with costs; so that all that the party who now asks for the interference of the Court, has to do, is to pay the costs.

The 46th General Order of 1828, directs that every application to stay proceedings upon any decree or order which is appealed from, shall be made first to the Judge who pronounced the decree or order. I always considered the essence of that general order to be that the Judge who pronounced the decree or order, was the person best able to determine whether the party who was dissatisfied with it, had a fair ground for appealing from it. If the Judge should see that the case involved important and difficult questions, and that it was probable that, if the application were not granted, the thing which formed the subject of the decree, would be placed in jeopardy and be irrecoverable in case the decree should be reversed, then it would be his duty to interfere in order to stay the execution of the decree. But,

where a decree has been appealed from, and no ground is stated for staying the execution of it, except that it may be reversed, the Court will not interfere.

Now, with respect, to this particular cause. It was argued at considerable length and with great ability; but there was no difficulty about the law of the case. It is true that I reserved my judgment upon it; but I did so because the parties, by what they had done amongst themselves, had involved the matter in great perplexity; and, therefore, it was necessary for me, before I could determine what ought to be done, to read, very deliberately, through the pleadings and evidence in the cause; and I exercised my best judgment in pronouncing the decree.

Then what was the course which was taken by Mr. *Herring*, against whom the decree was pronounced? He did not interfere, in the first instance, to stay the proceedings as to the payment of the costs directed by the decree. The Defendants' bills of costs were carried in, before the *Master*, to be taxed. The taxation was proceeded with, and was completed in May 1841. On the 5th of June, Mr. *Herring* was taken on an attachment for non-payment of the costs; and it was not until the 29th of November, that the present application was made.

If this case had really been one in which the Court ought to interfere, the application to stay the proceedings ought to have been made immediately. Instead of which the Plaintiff has allowed all these proceedings to take place and himself to be placed in contempt, before he made the application. So that, if this case had been one in which the Court ought to interfere, he

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has placed himself in an unfavourable position for the purpose of being heard; and, being in that position, he has made an application which rests only on the ground that, possibly, the decree may be reversed: and that, as I said before, is not a sufficient reason for staying the proceedings under the decree: and, consequently, the motion must be refused with costs.

1841: 10th Dec.

New Orders of August 1841. *Parties. Construction.*

The 30th Order of August 1841, does not apply to a case in which the equitable interest only, is vested, by devise, in *A.* and *B.*, in trust to sell, although they are empowered to give discharges for the proceeds.

TURNER *v.* HIND.

UNDER the settlement on the marriage of *John Turner* and *Mary Hind*, an estate was vested in trustees in trust for the husband and wife for their lives successively, and, after the death of the survivor, in trust for such of their children or grandchildren as *Mary Turner* should appoint by deed or will, and, in default of appointment, in trust for all the children of the marriage who should be living at the death of their surviving parent, and for the issue of such of them as should be then dead.

Mary Turner survived her husband. By her will, made in execution of the power, she appointed the estate to two persons, one of whom was the Plaintiff, in trust to sell and divide the proceeds amongst certain of her children, and she declared that the receipts of the appointees should be sufficient discharges for the purchase-money. The object of the suit was to have the trusts of the will carried into execution under the direction of the Court.

At the hearing of the cause, it was objected that the suit was defective in respect of parties; as some of the

persons interested, under the will, in the proceeds of the sale of the estate, and also some of the persons interested, under the settlement, in default of appointment*, were not made parties.

Mr. *Bethell*, for the Plaintiff, relied on the 30th Order of August 1841, which directs: "That, in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and, in such cases, it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit. But the Court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."

Mr. *Wilbraham* and Mr. *Freeling* also were counsel in the cause.

The VICE-CHANCELLOR:

It is quite evident that this case is not within the 30th Order of August 1841. That Order, on the face of it, applies to those cases only, in which a real estate is vested in trustees by devise, and such trustees are com-

* One of the questions in the suit was, whether the appointment was valid. It was clearly bad at law; as the appointees were not objects of the power.

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petent to sell and give discharges for the proceeds of the sale. Here, the persons who are empowered to give discharges for the proceeds of the sale, are not persons in whom the *legal* estate is vested by devise. Consequently, neither they nor the trustees of the legal estate under the settlement, will be able to make a good title, unless all the *cestuis que trust* are made parties to the suit*.

* See *Weatherby* v. *St. Giorgio*, 2 Hare, 624; and *Osborne* v. *Foreman*, Ibid. 656.

1841: 21st Dec.

HUDSON v. MADDISON.

Nuisance. Pleading. Parties. Mis-joinder.

A bill was filed by five several occupiers of houses in a town, to restrain the erection of a steam-engine which would be a nuisance to each of them. Held that each occupier had a distinct right of suit, and therefore that they could not sue as Co-plaintiffs.

THE bill was filed by five persons occupying houses in the town of *Louth* in *Lincolnshire*, for an injunction to restrain the Defendant from proceeding to erect a steam-engine and chimney in the neighbourhood of the Plaintiffs' houses, on the ground that the steam-engine would prove a nuisance to the Plaintiffs.

An injunction having been obtained, *ex parte*,

Mr. *Bethell* and Mr. *Anderdon*, for the Defendant, now moved to dissolve it, on the ground that each of the Plaintiffs had a right of suit distinct from the other; and, consequently, a suit instituted by them as Co-plain-

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Injunction.

On a motion to dissolve an injunction, the Defendant may rely on an objection, although it would have been a ground for demurring to the bill.

tiffs, could not be maintained: but an information ought to have been filed by the *Attorney-general* at their relation. *Jones* v. *Del Rio* (*a*), *Cowley* v. *Cowley* (*b*), *Sampson* v. *Smith* (*c*), *The Attorney-general* v. *Forbes* (*d*).

Mr. *G. Richards* and Mr. *Koe*, for the Plaintiffs, said that the Plaintiffs had a common interest in restraining the nuisance; that the ground upon which creditors were allowed to sue on behalf of themselves and others, was that they had a common interest; and that there was no doubt that the bill would have been sustainable if it had been filed by only one of the Plaintiffs. They referred to the following passage in the judgment in *Attorney-general* v. *Forbes*: "In informations and proceedings for the purpose of preventing public nuisances, the ordinary course is for the *Attorney-general* to take it on himself to sue, as representing the public: but it is equally certain that individuals who conceive themselves aggrieved, may come forward and ask the assistance of the Court to prevent a public nuisance from which they have individually sustained damage (*e*)." With respect to *Jones* v. *Del Rio*, they said that the ground on which Lord *Eldon* dissolved the injunction in that case, was that the *Peruvian* Government was not recognized by the Government of this country. They added that the objection on which the Defendant's counsel relied, could not be taken at the hearing of a motion to dissolve the injunction; but the Defendant ought either to have demurred to the bill, or to have waited until the hearing of the cause. *Spencer* v. *The London and Birmingham Railway Company* (*f*); *Story* on Eq. Plead. 341.

(*a*) Turn. & Russ. 297.
(*b*) *Ante*, Vol. IX. p. 299.
(*c*) *Ante*, Vol. VIII. p. 272.
(*d*) 2 Myl. & Cr. 123.
(*e*) Ib. 129.
(*f*) *Ante*, Vol. VIII. p. 193.

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The VICE-CHANCELLOR:

The only question is, whether the principle of Lord *Eldon*'s decision in *Jones* v. *Del Rio*, is applicable to the present case.

In the cases where The *Attorney-general* sues as representing the whole community, and certain individuals join with him, as relators and Plaintiffs, representing themselves as suing on behalf of themselves and all other persons affected by a nuisance, their being so added as parties, amounts only to that which The *Attorney-general*, as the informant on behalf of the public, had already done for them. But those cases are no authority for a case like the present, where several individuals having each an independent interest with respect to the matter complained of, choose to file a bill, to which they do not make The *Attorney-general* a party, praying a general decree as to that matter which separately affects the separate case of each of them. Whether a bill so constructed could be sustained, is a question which formerly gave rise to some fluctuation of opinion.

When the case of *Cowley* v. *Cowley* was before me, I was furnished, by the Registrar, with a note of a case before Lord *Bathurst*, in which His Lordship, at the hearing, dismissed those parties from the suit who had no interest, and gave relief as to those who had an interest. I also had a conversation with Lord *Cottenham*, relative to the question in *Cowley* v. *Cowley*; and His Lordship then expressed that opinion which appears in the Report of the case.

In the present case the bill is filed by five persons, each having a separate tenement: and they represent that the erection of the steam-engine and chimney will

operate as a nuisance to all of them. They therefore have joined their cases together. It is obvious, however, that, as each of them has a separate nuisance to complain of, that which is an answer to one, may not be an answer to the other: and if, upon such a bill, a decree were to be pronounced, it must be a decree which would provide for five different cases: and I do not think that such a decree could be made.

This bill asks for no relief, but only for an injunction; and if the Court sees that the injunction asked is one that could not be maintained at the hearing, why should it now continue the injunction? We have the express authority of Lord *Eldon*, in *Jones* v. *Del Rio*, that, on a motion to dissolve an injunction, a Defendant may rely on the same objections to the bill as would have formed a ground for demurring to it. In that case, the Defendant had not demurred to the bill, but had put in his answer to it: so that he had given an apparent stability to it in this Court; but, nevertheless, Lord *Eldon* dissolved the injunction; and, what is very remarkable, the injunction was one which he himself had granted.

As the law of this Court now stands, the objection which the Defendant has taken, is one which he had a right to take; and, as he has thought proper to exercise that right, the Court is now bound to entertain the objection: and, in my opinion, it is a valid one, and therefore the injunction must be dissolved.

WALKER *v.* FLETCHER.

1841: 22d and 23d December.

Affidavit. Practice. Stat. 53 *Geo.* 3, *c.* 159 *Shipowners (liability of).*

The Act of 53 Geo. 3, c. 159, for limiting the responsibility of shipowners in certain cases, requires an affidavit of certain facts to be annexed to bills filed under it. Held that it was no objection to such an affidavit, that it was sworn four days before the bill was filed, the deponents living at *Sunderland.*

THE 7th sect. of 53 Geo. 3, c. 159 (to limit the responsibility of shipowners in certain cases), enacts that if several persons shall suffer any loss or damage in or to their goods, wares, merchandizes, ships or otherwise, by any means for which the responsibility of any owner or owners is limited by this Act as aforesaid, and the value of the ship or vessel with all her appurtenances, and the amount of the freight, estimated as herein is mentioned, shall not be sufficient to make full compensation to all and every the person and persons suffering such loss and damage, it shall and may be lawful, to and for the person or persons liable to make satisfaction for such loss or damage, or any one or more of them on behalf of himself, herself or themselves and the other owner or owners of the same ship or vessel, to exhibit a bill, in any Court of Equity having competent jurisdiction, against all the persons who shall have brought any such action or actions, suit or suits as aforesaid, and all other persons who shall claim to be entitled to any recompence for any loss or damage arising or happening by the same separate and distinct accident, act, neglect or default or on the same occasion, to ascertain the amount or value of the ship or vessel, appurtenances and freight, and for payment or distribution thereof rateably amongst the several persons claiming recompence as aforesaid, in proportion to the amount of the several losses or damages sustained by such persons so claiming such recompence as aforesaid, according to the rules of equity and as the case may require: provided always that the

Plaintiff or Plaintiffs in such bill, shall annex to such bill an affidavit that he, she, or they do not directly or indirectly collude with any of the Defendants thereto or with any other owner or owners of the same ship or vessel, or with any other person or persons, but that such bill is filed for the purposes only of justice and to obtain the benefit of the provisions of this Act, and that the several persons named as Defendants to the said bill, are, as the person or persons making such affidavit verily believes, all the persons claiming to be entitled to recompence for loss or damage sustained by the same accident, act, neglect or default, or on the same occasion; and that all such Defendants do claim such recompence, and to be entitled to proportions of the value of such ship or vessel, appurtenances and freight; and that no other person claims to be entitled to any proportion thereof under the provisions of this Act, and that the amount of the value of such ship or vessel, appurtenances and freight, does not exceed a sum to be specified in such affidavit, and that the several claims, made by the Defendants to such bill, do exceed the amount of the value of such ship or vessel, appurtenances and freight: and the Plaintiff or Plaintiffs in such bill shall, on filing such bill, apply to the Court and obtain an order for liberty to pay into Court the *account* of the value of such ship or vessel, appurtenances and freight, as ascertained by such affidavit, and shall pay the same into Court according to such order.

(*sic.*)

The bill was filed, under the before-mentioned Act, praying, amongst other things, for an injunction to restrain an action brought, by the Defendants against the Plaintiffs, for the loss of their ship; which had been run down by the Plaintiffs' ship. The injunction was granted on the sum specified in the affidavit annexed to

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the bill, being paid into Court. A motion was now made to dissolve it.

Mr. *G. Richards*, Mr. *Bethell* and Mr. *Bacon*, in support of the motion, objected that the affidavit, though intituled in the cause, was sworn four days before the bill was filed, and consequently no indictment for perjury could be maintained upon it, as the suit in which it was sworn, was not then existing. They added that the practice which prevailed with respect to affidavits annexed to bills of interpleader, was not applicable to cases like the present; for, by the Act in question, the affidavits to be annexed to bills filed under it, were required, not only to deny collusion, but also to verify the material contents of the bill; and some of those facts might be true at the time when the affidavit was sworn, but might not be so at the time when the bill was filed.

Mr. *Stuart* and Mr. *Simpson* appeared for the Plaintiffs.

The VICE-CHANCELLOR:

With respect to the objection upon the statute, I have ascertained, upon inquiry, that, ever since this statute was passed, which is 28 years ago, the same practice has been adopted with respect to the filing of bills under it, as has prevailed for more than a century with respect to bills of interpleader and bills to change the jurisdiction in the case of lost deeds; that is to say, that the Six Clerks uniformly file the bills, with affidavits sworn before the bills are filed.

Lens v. *Mitchell.*

In the case of *Lens* v. *Mitchell*, which occurred last year *, an application was made, in the case of a bill of

* 7th March 1840.—Mr. *Knight Bruce* and Mr. *James Russell* moved, and Mr. *Jacob* and Mr. *Smythe* opposed.

interpleader, to detach, from the bill, the affidavit which had been attached to it; the fact being that the bill was filed on the 19th of February, and the affidavit, which the course of the Court required, was sworn on the 18th of February; and I made no order on the motion, except that the Defendant should pay the costs of it: because I found, upon inquiring of the Six Clerks, that a similar practice had always subsisted.

Notwithstanding the hypothetical objection that an indictment for perjury could not be supported on such an affidavit in case its averments should be false, still the necessity of the case requires that the affidavit should be sworn before the bill is filed. I do not sit here to inquire whether a practice that has prevailed, in this Court, for so many years, and which has been only followed in the case of this Act of 53 Geo. 3, is right or wrong. I must take the uniform practice that has subsisted for a long while, to be the right practice, unless it is altered by some new order of the Court.

With respect to this Act of Parliament, it is to be observed that it was passed at a time when Lord *Eldon*, who must have been pretty well aware of the course of this Court, was Lord Chancellor; and, if he had thought it necessary that the affidavit should be sworn after the bill was filed, am I to suppose that that learned Lord would have allowed the Act to pass the House of Lords in the form it now is? I cannot but suppose that such an Act of Parliament as this, which affected so materially the rights of the subject, did not pass without being much discussed. It is impossible that it could have been passed without much discussion; because it proceeds altogether on a new principle.

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If then the Legislature, in deliberately framing the Act, thought proper to require that parties seeking the benefit of it, should annex, to their bills, affidavits of certain facts, that is, should do what this Court had long before required to be done in certain cases, I must take it for granted that, as the Legislature did not enact otherwise, it meant such affidavits to be annexed to bills filed under the Act, as were then required, according to the course of the Court, in cases where bills were to be filed with affidavits annexed to them.

Next: with regard to the particular words of the statute. It enacts* that it shall be lawful for the persons who own the ship which comes in collision with the other and does the mischief, to exhibit their bill, in a Court of Equity, to have the value of their ship ascertained and the amount distributed amongst the persons claiming recompence from them. Then it directs that the Plaintiff or Plaintiffs to such bill shall annex an affidavit to it, denying collusion and stating that the value of their ship does not exceed a sum to be specified: and it certainly struck me as remarkable that there should then be this third provision, namely: "and the Plaintiff or Plaintiffs in such bill shall, on filing such bill, apply to the Court for liberty to pay into Court, the amount of the value of such ship as ascertained by such affidavit;" evidently implying that the application to the Court was an immediate, consecutive act on the filing of the bill; which could not be the case if the swearing of the affidavit and the annexing it to the bill, were to intervene between the filing of the bill and the application to the Court.

* *See* the 7th sect.

My opinion is, knowing what the practice has been, and seeing what was done in the case of *Lens* v. *Mitchell*, that I am not at liberty to say that what has been done in this case is wrong. The fact is that this affidavit was sworn at *Sunderland* on the 21st of June, and that the bill was filed on the 25th; and I cannot admit that the interval of four days, considering the distance of the place, is of itself a material space of time. Knowing what has been done in actually decided cases, namely that things which have taken three or four days to be executed, have been held to have been done *uno flatu*, I hold the filing of the affidavit on the 21st of June, and the annexing of it to the bill on the 25th, to be quite a sufficient compliance with the Act of Parliament*.

* Affirmed by the *Lord Chancellor*; *see* 1 Phill. 115. See also *Dobree* v. *Schroder*, *ante*, Vol. VI. p. 291

1842:
14th January.

SAMPAYO *v.* GOULD.

Settlement. Marriage articles. Construction. Powers to appoint new trustees, and to change securities.

A marriage contract, in the *Portuguese* language, between *British* subjects resident in *Lisbon*, expressed that the parties were desirous that it should be regulated, made binding and carried into full and complete effect according to the laws of *England*. Some years afterwards, the parties, who were then resident in *England*, filed a bill, praying that a settlement in strict conformity with the contract and containing all the covenants, clauses, powers &c. usually inserted in marriage-settlements and deemed necessary and, at the same time, consistent with the substance of the contract, might be executed under the decree of the Court. Held that a power to appoint new trustees as often as should be necessary, and (notwithstanding the contract provided that the settled monies should be invested, as they had been, in the *English* and *French* funds) that a power to change those securities for any other of the Government stocks or funds of *England* or *France* or for *real securities in Great Britain or Ireland*, were proper powers to be inserted in the settlement.

IN contemplation of the marriage between *Osborne Henry Sampayo* and *Christina Gould* (both of whom were then resident in *Lisbon* but were *British* subjects), a marriage contract to the following effect, was drawn up in the *Portuguese* language and executed according to the forms of *Portuguese* law:

"Know all ye to whom this present instrument of marriage contract, dowry, and settlement, power of attorney, convention and obligation shall come, that, in the year 1825 and on the 15th of November, I, notary, was sent for to make out this present deed, at the residence (in *Lisbon*) of *Gerard Gould*, a native of *England* and a merchant; and he was there present with his daughter *Christina*, a minor under 25 years of age; also *Gerard Gould* junior, her brother, a merchant of *Oporto*, and his uncle *John George Gould*, merchant; there were likewise present *Osborne Henry Sampayo*, merchant, a native of and formerly residing in the kingdom of *Ireland*, a minor under 25 years of age, legiti-

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mate son of *Antonio Teixeira Sampayo*, resident in *England*, attended by his uncle, the Count *de Povoa*; and, on behalf of *Francisco Teixeira Sampayo*, consul-general in *London*, appeared his substitute, *Richard Power*, merchant, a resident in *Lisbon*, trustees, appointed for the aforesaid *Osborne Henry Sampayo*, by his aforesaid father, and by him duly constituted his sufficient attornies. And it was then and there declared by *Gerard Gould*, that, approving of the marriage of his daughter, with *Osborne Henry Sampayo*, he, by this act, appointed, for her trustees, his son the aforesaid *Gerard Gould* junior and his brother, the aforesaid *John George Gould*, whom he constituted his full and efficient attornies, conferring upon them the necessary powers for entering into this marriage writing and for establishing the conditions of the contract, and also to manage and attend to the fulfilment of it, the amount of dowry, rights and shares which shall belong or appertain to his said daughter: and, by all the trustees and attornies, it was declared that, in conformity with the instructions of their constituents and in right of its being permitted, to the subjects of *Great Britain* resident in the *Portuguese* dominions, to enter into any contracts whatsoever amongst themselves according to the laws of *England*; and entering, amongst others, in this contract *the stipulation of funds, *some already existing and others, for the greater part, about to exist in England, they are desirous that, under the said laws of England, it should be regulated, made binding and carried into full and complete effect*; for which purpose, if it be necessary, they renounce the jurisdiction of *Portugal*: consequently they, the said trustees and attornies, declare that, on the aforesaid *Osborne Henry Sampayo* and *Christina Gould* intermarrying, their nuptial contract is as follows: that the said *Antonio Teixeira Sampayo* endows his afore-

* *sic.*

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said son, *Osborne Henry Sampayo*, with 20,000 *l.* sterling, of which capital his said son has already 5,000 *l.* employed in trade: that he, *Gerard Gould*, endows his said daughter, *Christina Gould*, with the like sum of 20,000 *l.* sterling, of which amount 3,000 *l.* are now invested in the *English* funds in the name of his aforesaid daughter: the remaining 17,000 *l.*, together with the other 15,000 *l.* that are disposable of the intended husband, shall be forthwith invested *in the English and French funds*; that the whole sum shall be collected and managed by the said attornies constituted and appointed by the fathers of the said intended husband and wife, who, for this purpose, are, by them, duly authorized, and who willingly and gratuitously undertake this commission, promising to fulfil it with exactitude: that the future husband and wife, at whatever time, for their decent maintenance, shall only be allowed the free disposal of the annual interest of all the afore mentioned capital which shall be so invested in the funds, separating, however, for the pin-money of the future wife, the interest already due and which may hereafter become due on the aforesaid 3,000 *l.*, which shall solely and exclusively belong to the said intended wife: that the 5,000 *l.* which form part of the portion of the said intended husband and now embarked in trade, shall alone remain subject to unforeseen commercial events and risks, but from which is absolutely excepted all the other part of the portion, which shall for ever enjoy the privileges conceded to dotal property: that if, at any time, the said 5,000 *l.* should become disposable out of trade in which they are now embarked, the same shall forthwith be invested in the aforesaid funds and go in augmentation of the above capital, which, *on no account or emergency whatever, shall be alienated, diverted or mortgaged, but, on the contrary, shall remain in the said*

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funds completely free: that, in case of the intended husband and wife living happily together for the term of 15 years complete, they shall be allowed to make a disposition in favour of their lawful issue, by and with the express concurrence of both, to the extent of half the amount of the capital so invested in the funds: that, in the event of the existence of issue at the decease of either of the parents, the dotal and inherited property shall be united, remaining to them, reciprocally, the free disposition of the acquired property; and, in the event of the decease of the children by this marriage under age (the future wife, their mother, not being any longer in existence), there shall return to the estate of the father, or, in his default, to his heirs and successors, the 20,000 *l.* sterling with which she is portioned by her aforesaid father; and the like shall be equally observed in the event of the said intended wife dying without leaving issue: and, lastly, in the same supposition of a default of lawful issue at the decease of the said intended husband, the said intended wife shall be entitled to the 20,000 *l.* sterling of her dowry, and, moreover, the estate be bound annually to pay her the interest of 10,000 *l.* sterling, by way and under the title of appanage: and, by them, the said intended husband and wife, it was spontaneously declared that they approved of this contract, its clauses and conditions in the manner and form as stipulated by the trustees and attornies in the names of those they represent; the said attornies binding and obliging, for the due fulfilment thereof, the properties and estates of their several constituents; all promising never to impeach this deed, but, on the contrary, desirous and willing that it should have full force, continuance and effective execution; and, if necessary, that it should be confined (confirmed *qu.*) by judicial decree: for which purpose they hereby hold themselves

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duly cited, and agree to its clauses, in order to being especially condemned, each one in the part that respectively concerns him."

Shortly after the date of the contract, the marriage was solemnized in *Lisbon*, and the stipulated sums were invested partly in the *English* and partly in the *French* funds, in the names of the Count *de Povoa*, *Francisco Teixeira Sampayo*, *Gerard Gould* the younger and *John George Gould*, the trustees named in the contract; and the dividends were paid to the husband and wife.

No formal settlement having been executed in pursuance of the marriage contract; and the Count *de Povoa* and *Francisco Teixeira Sampayo* being dead, and *John George Gould* being desirous of retiring from the trusts, *Osborne Henry Sampayo* and *Christina* his wife (who were then resident in *England*), filed a bill, in December 1839, against the surviving trustees, stating that the marriage contract was very vaguely expressed, and was altogether defective for all the purposes of a marriage settlement, and deficient in all the usual covenants, powers and provisoes usually inserted and deemed necessary in *English* marriage settlements; and that, under the circumstances, the Plaintiffs were advised that it was proper and necessary that a marriage settlement, in strict conformity to the contract entered into at *Lisbon*, and containing the covenants, clauses and powers usually contained in *English* marriage settlements of personal property, should be executed, and that new trustees should be appointed in the room of the deceased and retiring trustees; and praying that a settlement of the trust-funds, in strict conformity with the marriage contract, and containing all the covenants, clauses, powers, provisoes and agreements usually inserted in

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English marriage settlements of personal estate or stock, and deemed necessary and, at the same time, consistent with the substance of the contract, might be executed by the decree and under the direction of the Court, and that new trustees might be appointed in the room of the deceased and retiring trustees.

By the decree at the hearing of the cause, it was referred, to the *Master*, to settle and approve of a proper settlement of the trust funds, according to the law of *England, with all usual and customary clauses and powers, the Master having regard to the provisions of the contract of marriage*; and the *Master* was directed to appoint three new trustees of the trust property.

The *Master* appointed three new trustees, and approved of a settlement of the trust funds, as directed by the decree.

The Defendants excepted to the report, first, because the *Master* had inserted, in the settlement, a power enabling the trustees, with the consent of the husband and wife during their lives and of the survivor of them during his or her life, and, after the death of the survivor and during the minorities of the children of the marriage, at their own discretion, to sell the trust-funds or any part thereof, and invest the proceeds in the public stocks of *England* or *France, or upon real securities in Great Britain or Ireland, at interest, by way of mortgage*: and, secondly, because the *Master* had inserted, in the settlement, a power (which was in the usual form) for the appointment of new trustees from time to time.

Mr. *G. Richards* and Mr. *Roundell Palmer*, for the Defendants, said, in support of the first exception, that

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the decree expressly directed the *Master*, in approving of the settlement, to have regard to the provisions of the marriage contract: that, by that contract, the marriage portions were to be invested in the *English* and *French* funds, and no power was given, to the trustees, to invest them in any other securities; consequently the *Master* ought not to have authorized the trustees to invest the portions in real securities.

In support of the second exception, they referred to *Bayley* v. *Mansell* (*a*), where, on a bill filed for the appointment of new trustees, Sir *John Leach*, Vice-Chancellor, would not allow a clause to be inserted authorizing the appointment of new trustees as often as should be necessary; on the ground that there was no provision to that effect in the trust-deed: and they distinguished this case from *Lindow* v. *Fleetwood* (*b*) on the ground that, there, the will in pursuance of which the settlement was made, directed all proper and reasonable powers to be inserted in the settlement; but the marriage contract in this case, contained no such direction.

Mr. *Bethell* and Mr. *Addis*, in support of the report, said that the parties to the marriage articles contracted with special reference to the laws of *England*; for the articles expressed that the parties: "were desirous that, under the laws of *England*, the agreement should be regulated, made binding and carried into full and complete effect:" and the articles mentioned that part of the funds intended to be settled, was then in *England*, and showed that the parties contemplated that the greater part of those funds would be in England: *Hill* v. *Hill* (*c*): in which case the Court drew a distinction

(*a*) 4 Madd. 226. (*b*) *Ante*, Vol. VI. p. 152.
(*c*) Ibid. 136; *see* Judgment.

etween inserting in a settlement powers for the ma-agement and better enjoyment of the settled property hich are beneficial to all the parties), and powers hich confer personal privileges on particular parties: hat the powers in question in the present case, were nerely powers for the management of the trust-property: hat *Bayley* v. *Mansell* was not in point; for, there, the Court was not dealing with an *executory* contract, as it was in the present case: that the decree directed the *Master* to approve of a settlement, with all usual and customary clauses and powers; and powers to appoint new trustees and to invest the trust-funds in real securities, were usual and customary; therefore the *Master*, in approving of the settlement, had done nothing more than follow the decree (*d*).

The VICE-CHANCELLOR:

I am as much bound by my own decree, as if it had been the decree of another Judge: and, therefore, I must proceed to consider this question on the footing, solely, of the language of the decree.

Now that decree has referred it to the *Master* to approve of a settlement with all usual and customary clauses and powers, the *Master* having regard to the provisions of the contract of marriage: by which I understand that there were to be inserted in the settlement, all clauses and powers which are usual and customary; but they were to be determined with this sort of regard to the contract, namely, that any clause or power which is expressly excluded by the contract,

(*d*) See *In the Matter of* 52 *Geo.* 3, *c.* 101, *ante*, p. 262. — The Reporter has been informed that the name of the petitioner in that case was *Tittlewell*.

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although it be a usual and customary one, is not to be inserted; but, if it was consistent with the contract, then it was to be inserted.

I will consider, first of all, the important one, namely, that one which authorizes the change of securities. Now, I should say, in the first instance, that a clause authorizing the change of securities, is usual and customary, and is usual and customary only because it is found to be of the greatest possible convenience to parties. Then the question is whether there is anything, on the face of this contract, which excludes this usual and customary clause? Now it is certainly true that the parties have, in the first instance, pointed out, as the mode of investment, the *English* and *French* funds. The expression is, "the *English* and *French* funds," by which they mean the *English* or *French* funds. But, upon reading over the very words of the contract, it seems to me that the parties themselves have expressly supposed that a portion of the fund might have come out of the *English* or *French* funds, and been otherwise invested; because there is this direction: "that if, at any time, the 5,000*l.* should become disposable out of trade in which they are now embarked, the same shall, forthwith, be invested in the aforesaid funds, and go in augmentation of the above capital, which, on no account or emergency whatever, shall be alienated, diverted or mortgaged." Therefore we find that the parties themselves contemplated the event that a portion of this capital might be alienated, diverted or mortgaged. How then am I to say, though they, in the first instance, referred, generally, to the *French* or *English* funds, that they have not also referred to some other disposition of the property than in the *French* or *English* funds: and, in my opinion, if you minutely consider the language

of every sentence in the contract, you do find that the parties did contemplate some other investment than merely the *French* or *English* funds. The consequence is that the insertion of the clause authorizing the change of securities, is right.

Then, with respect to the power to appoint new trustees. Upon the face of the decree it appears that two of the original trustees are dead and that another of them is desirous to retire from the trust: and the decree refers it, to the *Master*, to appoint three proper persons to be trustees of the trust-property in their room. And it appears to me that, as the Court has thus sanctioned the appointment of new trustees in lieu of the two who are dead (a matter that could not be avoided), and in lieu of one whom the Court allows, at his own request, to retire, the Court can sanction the appointment of trustees in future cases where it may be necessary. Therefore, no question being raised before me about the particular language in which the power to appoint new trustees is couched, my opinion is that the *Master*'s report is right.

I rather think the word ought to be *Government* instead of public securities; because this Court does not allow property to be invested in public securities which are not Government securities.

1842: 22d and 24th January, and 9th February.

Custom of London. Orphanage-part. Survivorship. Evidence.

By the custom of *London*, if a freeman dies intestate leaving several children, and one of them dies an infant, his orphanage-share survives to his brothers and sisters, and if another child dies an infant, his accrued as well as his original share survives in like manner: and the accumulations accompany the shares from which they arose.

A book produced from the muniment-room of the corporation of *London*, was held to be receivable as evidence of the custom.

BRUIN *v.* KNOTT.

IN October 1823, *Joseph Aldridge*, a citizen of *London*, died intestate, leaving the Defendant *Ann* (who afterwards married the Defendant *Knott*) his widow, and two infant children by her, named *Joseph* and *Elizabeth*, and the Plaintiff *Sarah*, the wife of the Plaintiff *George Bruin*, his only child by a former wife, him surviving. Shortly after his death, his widow took out administration to him; and, out of his personal estate, paid his debts and funeral expenses, and retained her widow's apparel and the furniture of her bed-chamber: and the balance which remained in her hands, and which was of very large amount, became distributable, *according to the custom of London*, as follows: one-third to her as the intestate's widow, another third to her as administratrix, and the remaining third amongst the three children in equal shares; but the shares of the two youngest children did not, as the bill alleged, vest absolutely in them by reason of their being infants*. *Ann Knott* paid

* The following is an extract from *Toller* on Executors, pp. 389 and 393, relative to the custom of *London*: "If a freeman of the city die leaving a widow and children, his personal property, after deducting her apparel and the furniture of her bed-chamber, is divided into three equal parts, one of which belongs to the widow, another to the children, and the third to the administrator in that character. The portion of the administrator is styled, in law, the dead-man's part; because, formerly, the Ordinary, or his grantee, was to dispose of it in masses for the deceased's soul. But, after the disuse of this practice, the administrator was wont to apply it for his own benefit; till the Legislature, by the stat. 1 Jac. 2d, c. 17, declared that it should be subject to

Sarah Bruin's share of the orphanage-part (that is, one-third of a third of the intestate's residuary estate) to *Sarah Bruin* and her husband; and she invested the remaining two-thirds in the purchase of stock, on account of the two infants *Elizabeth* and *Joseph*; and she received and accumulated the dividends of the stock so purchased.

Elizabeth died on the 26th of May 1829, an infant; and her mother took out administration to her. *Joseph* also died, an infant, on the 24th of February 1837.

The bill alleged that, on *Elizabeth*'s death, one moiety of her share of the orphanage-part and of the accumulations thereon, survived, by the custom, to *Sarah Bruin*, and that the other moiety survived to *Joseph*: and that, on *Joseph*'s death, his original share of the orphanage-part, *and also that moiety of Elizabeth's share which survived to him on Elizabeth's death, survived, by the*

the Law of Distributions. * * * If a freeman leave several children, the share or the orphanage-part of any one of them, is not vested in him by the custom, till the age of 21; after which period, but not before, he may dispose of it by will, or, in case of his dying intestate, it shall be distributed pursuant to the statute. If he die under that age, whether sole or married, his share shall survive to the others." The learned author then states a proposition, which, though warranted by the authority to which he refers, the above Report shows to be untenable. He says: "But the survivorship of the orphanage-part, holds only as to the orphanage-part belonging to the deceased himself; for, if he had, by survivorship, the part of any of his brothers or sisters, *that* shall go according to the statute."

Mr. *Williams* too, in his valuable work, lays down the same proposition, and refers to the same authority in support of it. *See* Treat. on Executors, vol. 2, p. 955.

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custom, to Sarah Bruin, together with the accumulations thereon: that the Defendants pretended that the last-mentioned moiety of *Elizabeth*'s share and of the accumulations thereon, *vested*, on her decease, *in Joseph, absolutely, and was no longer subject to the custom*; and that *Joseph*, being 18 years of age, had made a will and bequeathed the whole of his property to his mother. The bill prayed, amongst other things, that *Sarah Bruin* might be declared entitled to *Joseph*'s original share of the orphanage-part and the accumulations thereon, and also to that moiety of *Elizabeth*'s share of the orphanage-part, which, on her death, survived to *Joseph*, and also to the accumulations thereon *.

Mr. *Boteler* and Mr. *Parry*, for the Plaintiffs:

There is an Anonymous case (*a*) said to have occurred in Michaelmas Term 1720, in which it is stated that two cases were cited, *Ambrose* v. *Ambrose* and *Rawlinson* v. *Rawlinson*, where it had been certified to be the custom of *London*, and was accordingly decreed by the Lord Chancellors *Harcourt* and *Cowper*, successively, that, if a city-orphan dies before 21, the survivorship holds only as to the orphanage-part belonging to himself; for that, if he had, by survivorship, the part of any other of his brothers or sisters, *that* should go according to the Statute of Distributions. That report, however, must be erroneous; for search has been made, and the only case relating to the custom of *London*

* It will be seen, from the above statement, that the question in the cause was, shortly, this: whether a share of the orphanage-part survives more than once.

(*a*) 1 Prec. Ch. 537.

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which occurred in Michaelmas Term 1720, is *Knipe* v. *Vale* (*b*); and, in that case, no question as to the survivorship of a survived share of the orphanage-part, could have arisen: for, there, *Thomas Draper*, a freeman of *London*, died intestate leaving a widow and three children, *John*, *Burgis* and *Mary*, surviving. *John* attained 21 and died, having appointed *Richard Cole* his executor; then *Mary* died an infant: and the Court declared that the Defendant *Burgis*, and *John* and *Mary Draper* had, each of them, by the custom of *London*, a right to one-third of a third of the late father's estate; and that, *John* being dead, the Defendant *Cole*, as his executor, was become entitled to his share; and that *Mary* also being dead, and dying before she attained her age of 21, the Defendant *Burgis*, became entitled, by the custom, to her share, by survivorship. As, therefore, one only of the children died under age, no question as to the survivorship of the share of a predeceased child, could have arisen in that case.

Knipe v. *Vale.*

Search also has been made, both in the Report-office of this Court, and in the office of the town-clerk of the City, for the cases of *Ambrose* v. *Ambrose* and *Rawlinson* v. *Rawlinson*; but no certificate as to the custom of *London* could be found in either of those cases. Indeed no question as to the custom arose in either of them.

It appears, from the entry of *Ambrose* v. *Ambrose* in *Reg. Lib.* (*c*), that *Jonathan Ambrose*, a freeman of *London*, died intestate in 1699, seised of real estate and possessed of personal estate, and that he left a widow, who took out administration to him, and three infant

Ambrose v. *Ambrose.*

(*b*) Reg. Lib. A. 1720, fo. 63. *See* also Viner's Abridgment, 8vo. edit. p. 213, tit. Custom of *London*.

(*c*) A. 1715, fo 514

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daughters, *Elizabeth*, *Thomasin* and *Theodosia*, his only children him surviving. In February 1700, *Theodosia* died an infant of about two years of age; and, in May 1714, *Elizabeth* married *Thomas Ambrose*: and they filed a bill against the widow and *Thomasin* and certain other persons, praying that the Plaintiffs might have satisfaction in respect of the intestate's personal estate, and have a conveyance of such part of his real estates as the Plaintiff, *Elizabeth*, should appear to be entitled to. The cause was heard on the 29th of June 1716; and, the Court, after decreeing an account to be taken of the personal estate and of the rents and profits of the real estate received by the widow, ordered the personal estate, after allowing for the intestate's debts and funeral expenses and for the widow's chamber and paraphernalia, to be divided into thirds, and that one-third should be retained by the widow for her own use, that another third should go to the Plaintiff *Elizabeth* and her two sisters, *Thomasin* and *Theodosia* deceased, and that the remaining third should go according to the Statute of Distributions; and that the widow should have a liberal allowance, out of the children's parts, for their maintenance and education: and the Court declared that the share which, by the custom of *London*, belonged to *Theodosia*, ought to be divided between the Plaintiff *Elizabeth* and her sister, the Defendant *Thomasin*.

Rawlinson v. *Rawlinson*.

In *Rawlinson* v. *Rawlinson*(*d*), Sir *Thomas Rawlinson*, by his will, disposed of his real and personal estate for the benefit of his widow and children. He died in 1706, leaving his widow and nine children surviving. All of them, except *Thomas* the eldest, were infants. In

(*d*) Reg. Lib B. 1713, fo. 329.

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1713 the bill was filed, by the younger children, against their elder brother and their mother and other parties, praying that the Defendants who had possessed themselves of any part of the testator's estate, might account for the same, and that the shares of it which should appear to belong to the Plaintiffs, might be placed out at interest for their benefit. *Thomas*, the eldest child, elected to take his share of his father's personal estate according to the custom of *London* and not according to the will (*e*); and his share according to the custom was ordered to be paid to him; but, it being more beneficial to his brothers and sisters to take according to the will, the shares to which they were entitled under the will, were ordered to be placed out on securities for their benefit until they should attain 21.

Mereweather v. *Hester*.

In *Burn*'s Ecclesiastical Law (*f*) the Anonymous case in Precedents in Chancery, is mentioned as *Mereweather* v. *Hester*; but it appears, from an extract of that case which we have procured from the Registrar's book (*g*),

(*e*) Until the 11th Geo. 1, c. 18, was passed, freemen of *London* could not dispose, by will, of the whole of their personal estate, unless they died without leaving either wife or child. Sir *Thomas Rawlinson* died in 1708, and the suit was heard in 1713 (12th Anne). *Thomas Rawlinson*, the son, said, in his answer, that he was advised that Sir *Thomas*, being a freeman of *London*, could not, by his will, bar him (the Defendant) of a share of one moiety of his personal estate in equal degree to the rest of his children: for that Lady *Rawlinson* (Sir *Thomas*'s widow) was, by marriage settlement, barred of her customary part of the personal estate; and that the same ought to be divided into two moieties, and he ought to have his share of one moiety, according to the custom of the city.

(*f*) Vol 4, p. 573, 9th Edit. tit. Wills; Distribution according to the custom of *London*.

(*g*) Reg. Lib. B. 1718, fo. 333.

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that *Jonathan Leigh*, the freeman in that case, left no widow and only one child; and, therefore, no question as to the survivorship of a share of the orphanage-part, could arise in that case. We submit that we have now shown clearly that neither the case in Precedents in Chancery nor either of the cases referred to in it, are any authority for the proposition which they have been hitherto considered to establish.

We now come to those cases which prove the custom to be as we contend for.

Wilcocks v. *Mayne.*

The first case is *Wilcocks* v. *Wilcocks* (*h*). There *John Wilcocks*, a freeman of *London*, died intestate in September 1697, leaving six infant children, *Joseph*, *Elizabeth*, *Rebecca*, *John*, *Jane* and *Bridget*. *John* died an infant and then *Elizabeth* died, also an infant: and the Court first ordered one-third of their father's clear personal estate to be distributed amongst *all* the children in equal sixth parts, as their orphanage-parts: it next ordered *John*'s sixth to be distributed amongst his five brothers and sisters, including *Elizabeth*: and it then declared that *Elizabeth*'s share, as an orphan of the city of *London*, of her father's estate, *and her share of her brother John's orphan share thereof, ought to be equally divided and distributed amongst her surviving brothers and sisters*; and they being still under age, it was referred to the *Master*, to settle a suitable sum for their maintenance, which was to be paid out of the interest of their respective shares and estates.

In *Hervey* v. *Desbouverie* (*i*) Lord *Talbot*, C. lays it down that neither the freeman nor the orphan can

(*h*) 2 Vern. 558. Entered in Reg. Lib. as *Wilcocks* v. *Mayne*, B. 1705, fo. 507.

(*i*) Ca. *Temp. Talbot*, 130.

devise against the custom; nor can they, any more, devise what accrued by survivorship than the original share.

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Jesson v. *Essington.*

The next case is *Jesson* v. *Essington*, which is reported, but not upon the present question, in Prec. Ch. 207. There *Abraham Jesson*, a freeman of *London*, died in August 1680, leaving a widow and five infant children, and having made a will of which his widow, who afterwards married the Defendant *Essington*, was the executrix. Two of the children, *Mary* and *Sarah*, died infants; and the bill was filed, by the three survivors, for an account of their late father's estate. On the 21st of March 1701, the *Master* reported a certain sum, being the amount of one-third of the deceased's personal estate and of an accumulation of interest thereon, after deducting certain sums for the maintenance and funerals of *Mary* and *Sarah*, *to belong to the Plaintiffs, the three surviving children.* The Defendant *Essington* excepted to the report; and, on the exceptions coming on to be argued on the 13th of November 1702: "the matter of the Defendant's 2d, 3d, and 4th exceptions being touching the dispositions of the shares of the personal estate of the Plaintiffs' late father (who was a citizen and freeman of London) which belonged to *Mary* and *Sarah Jesson*, the Plaintiffs' sisters, who died intestate after their said father's death and in the life of their mother," the Lord Keeper ordered that the Lord Mayor and Court of Aldermen should certify what was the custom of the city in relation to the shares of the testator's estate that were due to the deceased orphans; and his Lordship reserved his decision upon the 2d, 3d, and 4th exceptions until after the certificate should have been made. On the 18th of February 1703 the Lord Mayor and Court of

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Aldermen certified that, if a freeman of London died leaving a widow and several children unpreferred by their father in his lifetime, one-third of his personal estate (his debts and funeral charges being first deducted) belonged to such children equally; and that, if any such orphan, being a male, happened to die under 21, or, being a female, under that age and unmarried, the share of such male or female so dying, belonged to the surviving orphan or orphans, as part of the customary or orphanage part of the personal estate of their father deceased; whereof such father or orphan so dying had no power of disposal, by will or otherwise, contrary to the custom. Whereupon and upon hearing what was alleged by both sides, the Lord Keeper, on the 9th of March 1703, overruled the exceptions on which he had reserved his judgment (*k*).

The last case is that of *Thomas Ash*, which is contained in a book produced by one of our witnesses from the muniment-room of the corporation of London.

Mr. *G. Richards*, for the Defendants:

We object to that book; it has no heading at all, and there is nothing to show that it is connected with the Orphans' Court. Its contents might be evidence against the corporation of London, but they cannot be evidence against a stranger.

(*k*) Reg. Lib. A. 1702, fo. 117. A book also was produced, from the muniment-room of the corporation of *London*, in which *Jesson* v. *Essington* was twice entered. It contained records of the proceedings of the Orphans' Court, and was intituled "Repertory, temp. *Dashwood*, Mayor." The production of it was objected to by the Defendant's counsel; but the objection was withdrawn.

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Mr. *Boteler*, in answer to the objection, cited *Stead* v. *Heaton* (*l*).

The VICE-CHANCELLOR:

The witness by whom the book is produced, says that it is kept in the muniment-room of the corporation of *London*, under the custody of the town clerk. Now the Lord Mayor and Aldermen constitute the Orphans' Court, and the town clerk is the officer of the Lord Mayor and Aldermen: and, if the book shows how the court has managed the estates of orphans for a long series of years, I should rather think that the course of practice which may be deduced from that book, must be taken as the law of the court. At present, however, I know nothing about the contents of the book; and, before I decide as to its admissibility, I must have an opportunity of looking into it, in order to see what it contains. But what strikes me at present is that this book, being found in the repositories of the corporation of *London*, would be evidence of the course of dealing with the estates of orphans, which has been adopted by that portion of the corporation which constitutes the Orphans' Court. I reserve, however, my decision upon the point; but, in the mean time, the book may be read *de bene esse*.

Ash's Case.

Mr. *Boteler* then read, from the book: "An account of the estate of *Thomas Ash*, late citizen and goldsmith of *London*, deceased;" one-third of which, after making certain deductions for the deceased's debts and funeral and for the widow's chamber, amounted to 85*l*. 9*s*. 6$\frac{3}{4}$*d*., "which said sum is, by the custom, to be equally divided between eight children, *Thomas, Joseph, Elizabeth,*

(*l*) 4 T. R. 669.

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Ann, *Margaret*, *James*, *Mary*, and *Elizabeth* orphans, which maketh, to every of them thereof, 10*l.* 13*s.* 8½*d.* *Mem*: That *Mary* and *Elizabeth*, two of the said orphans, who were posthumous, are lately deceased; for whom was paid and expended, for physic and medicines during their sickness, 1 *l.* 3*s.* 11*d.*; which being deducted out of their customary parts aforesaid amounting to 21 *l.* 7*s.* 4½*d.*, there remains 20 *l.* 3*s.* 5½*d.*; *which, by the custom, belongs to the said six surviving children*, and maketh to every of them thereof, 3 *l.* 7*s.* 3*d.*"

Mr. *G. Richards*, Mr. *James Russell* and Mr. *Collins*, for the Defendants, contended that the cases which had been brought forward by the Plaintiffs' counsel, did not establish the point in support of which they had been adduced, namely, that a share of the orphanage-part which had once survived, was subject, by the custom, to survive a second time; but that they proved merely that an original share would survive, which was not disputed: and they relied on the Anonymous case in Precedents in Chancery: and *Coomes* v. *Elling* (*m*); *Withill* v. *Phelps* (*n*); *Lewin* v. *Lewin* (*o*); *Blunden* v. *Barker* (*p*); *Onslow* v. *Onslow* (*q*); *Fouke* v. *Lewen* (*r*); *Mereweather* v. *Hester* (*s*).

The VICE-CHANCELLOR:

Before I pronounce my judgment, I shall look at all the cases that have been extracted from the Registrar's book, and consider them attentively; for I have not

(*m*) 3 Atk. 676.
(*n*) Prec. Cha. 325.
(*o*) 3 P. W. 15.
(*p*) 1 P. W. 634.
(*q*) *Ante*, Vol. I. p. 18.
(*r*) 1 Vern. 88; and 4 Burn's Eccl. Law, 573.
(*s*) 7 Vin. 209, pl. 18.

been able to do so during the argument: and I consider myself at liberty to look at *Ash*'s case, on the ground that the book in which it is contained, shows how the Orphans' Court has, from time to time, dealt with the estates of orphans. That is the point of view in which I consider the book. It is very probable, if I were to refer the question in this cause to the Lord Mayor and Aldermen, in order that they might certify what the custom is, they would look into that book and be guided by its contents in coming to a conclusion upon the point: and it seems to me not to be unreasonable that they should be so guided.

The VICE-CHANCELLOR:

9th February.

In this case of *Bruin* v. *Knott*, the question that I have to decide is whether, having regard to what is to be found in the printed cases, and to what is to be deduced from the decrees and orders with which I have been furnished from the Registrar's book, it is so perfectly clear that a survived orphanage-share, with its accumulations, is subject to the custom of *London*, that it would be unnecessary or unfit to require a certificate, from the court of the Lord Mayor and Aldermen, upon the point.

First; with respect to the printed cases, the law seems to stand in this way. According to the Anonymous case in Precedents in Chancery, p. 537, it was held, by Lord Chancellors *Harcourt* and *Cowper* successively, that, if a child of a freeman had, by survivorship, the part of any of his brothers or sisters, *that* should go according to the Statute of Distributions and not according to the custom.

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In the case which is found in *Burn*'s Ecclesiastical Law, the law is stated according to what is laid down in the case in Precedents in Chancery, namely, that the accrued orphanage-share shall go according to the Statute of Distributions.

In *Coomes* v. *Elling*, Lord Chancellor *Hardwicke* thought that the expenses of the funeral of an infant orphan, ought to come out of the orphan's customary share. Now that always appeared to me to be inconsistent with the survivorship of the whole of the infant's share to the other children; because, though it will be found that it has been the practice to allow maintenance out of the orphanage-share, that is nothing more than an application, by one of the joint tenants of the fund, of a part, not exceeding his own share, for his own benefit: but, inasmuch as the survivorship, if it takes effect at all, takes effect immediately at the death, and the funeral takes place after the death, the application of a part of that survived share towards the expenses of the funeral, is inconsistent with the survivorship: it eats into the survivorship and diminishes the right of survivorship.

On the other side, there is the case of *Hervey* v. *Sir Edward Desbouverie*; where Lord *Talbot* held it to be clear that neither the freeman nor the orphan could devise what accrued by survivorship. That is stated very clearly by him; but it does not seem to me to go to the point; because the point now before me, is as to the accruer of a survived share.

I have read through all the copies of decrees and orders which were referred to in the course of the argu-

ment; but it is impossible to understand what was done in those cases without stating the circumstances of each. The first is *Jesson* v. *Essington*. There the freeman of the city of *London*, was *Abraham Jesson*. He died leaving a wife, *Elizabeth*, who, after his death, married the Defendant *Essington*. *Abraham Jesson* left five children, namely *Abraham*, *Eliza*, *Mary*, *Rebecca* and *Sarah*. *Mary* died after her father, and *Sarah* also died after her father: and I collect, from what is to be found in the course of the *Master*'s report, which is a very long one, that *Mary* died before *Sarah*: and it appears that the charges for their funerals, as well as the charges for their maintenance, were deducted out of their shares; and that the surplus survived to *Abraham*, *Eliza* and *Rebecca*. Several exceptions were taken to the report; and, on the exceptions coming on to be argued, an order was made for procuring a certificate from the city of *London*; and the certificate is given, at length, amongst the papers. The certificate, it should be observed, refers only to the survivorship to the children; because it was contended, by the Defendant *Essington*, who had married the mother, that the share did not go to the children, but went to the mother; and it was with reference to that point that the certificate was ordered; and, after the return of the certificate, the Defendant's exceptions were over-ruled. The certificate does not allude to that part of *Mary*'s share which had survived to *Sarah*; and, therefore, I infer that no question was made respecting it.

Then the next case is *Wilcocks* v. *Mayne*. There *John*, the freeman of the city of *London*, had issue, by his wife *Elizabeth*, three children, *Joseph*, *Elizabeth* and *Rebecca*: and he had, by a second wife, *Jane*, the same number of children, *John*, *Jane* and *Bridget*. *John*

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died after his father, and before his sister *Elizabeth*, and under age; and then *Elizabeth* died under age; and the decree gives over to *Jane*, *Bridget*, *Joseph* and *Rebecca*, *Elizabeth*'s original share and also her share of her brother *John*'s orphanage-share. But then it is to be observed that nothing is said about the funeral expenses of *John*; so that, in these two cases that I have mentioned, it certainly appears that, without question being made, the accrued share was carried over by survivorship: in the one case the funeral expenses were deducted, and, in the other case, it does not appear that anything was said about the funeral expenses.

The next case is *Ambrose* v. *Ambrose*. There *Jonathan*, the freeman, died intestate; and he left three children, namely, *Elizabeth*, who married *Ambrose*, and *Thomasin* and *Theodosia*. The father died in 1699, and *Theodosia* died in 1700, an infant and unmarried; and it was decreed that *Theodosia*'s orphanage-share ought to be divided between her sisters *Elizabeth* and *Thomasin*: but no question arose as to the survived share of her orphanage-share.

The next case is *Rawlinson* v. *Rawlinson*. There Sir *Thomas Rawlinson* died in 1706; and he had nine children who survived him. But, in that case, no question arose as to the survivorship of any share of any one child; but all that was held was that *Thomas*, the eldest son, was entitled to his orphanage-share; and, as to the others, the court determined that they had a right to elect to take either according to the father's will or against it.

The next case is *Mereweather* v. *Hester*. That is a very simple case; because *Jonathan*, the freeman, who

ied on the 17th of September 1717, left only one hild, *Hannah*; consequently, no question as to surivorship arose or could have arisen.

Then the next case is *Knipe* v. *Vale*. There *Thomas Draper* had a first wife, by whom he had two children, namely, *Burgis* and *John*; and he had a second wife, *Mary*, who became his administratrix; and, by her, he had a child, *Mary*. He died in 1704, leaving all the children infants. Then it appears that *John* attained his age of 21 years and died, and *Cole* was his executor. *Mary* died in May 1712, an infant and unmarried; and it was held that *Mary*'s orphanage-share survived to *Burgis*; but no question did or could arise as to the accruer of a survived share. That is the substance of the cases taken from the Registrar's book.

There also was an extract made, from the city books, of *Thomas Ash*'s case; and that is to the same effect, precisely, as *Jesson* v. *Essington*.

Now it would seem, from *Ash*'s case and from the cases of *Jesson* v. *Essington* and *Wilcocks* v. *Mayne*, that a survived share of the orphanage-part has been treated as subject to the operation of the custom: but it does not appear that any question whatever was raised respecting that point. Moreover, the cases in which, as I said before, the point seems to have been passed over without question or observation, are opposed by the opinion, which is expressed by both Lord Chancellor *Harcourt* and Lord Chancellor *Cowper*, that a survived share goes, not according to the custom, but according to the Statute of Distributions. Besides, the deducting of the funeral expenses, is inconsistent with the right by survivorship.

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The question before me is, whether the point is so perfectly clear that it is unnecessary to have recourse to the city authorities. When I consider that, upon the fair estimate of all the cases taken together, the point is by no means made out, but that it is recorded, in print, that two Lord Chancellors held the contrary to what seems to have been done in the three cases that I have just now mentioned; and when I further consider that the certificate of the Lord Mayor and Aldermen will put the matter beyond all doubt, and will, probably, tend to save expense to the parties, by making the decree one from which there can be no appeal, my opinion is that I ought to send the question to the court of the Lord Mayor and Aldermen for their opinion upon it.

The following questions were accordingly submitted to the court of the Lord Mayor and Aldermen:

Whether, where there are several orphan children of a freeman who dies intestate, the share which any one may take by reason of surviving a child that dies an infant, does, itself, survive among the other children, in case of the death of the party, to whom it has come, under the age of 21 years:

And whether, if there be an accumulation of interest upon an orphanage-share, the accumulation survives in the same manner as the original orphanage-share?

On the 28th of July 1842, the Recorder of *London* appeared in Court, and certified, on behalf of the Lord Mayor and Aldermen, that, where there are several orphan children of a freeman who dies intestate, the share which any one may take by reason of surviving a child that dies an infant, survives among the other children,

in case of the death of the party, to whom it has come, under the age of 21 years: and if there be an accumulation of interest upon an orphanage-share, the accumulation survives in the same manner as the original share.

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This cause was now brought on to be heard on the equity reserved; and, at the same time, a motion was made, on behalf of the Defendants, the notice of which was to the following effect: that the Lord Mayor and Court of Aldermen might be directed to review so much of their certificate, bearing date the 26th of July 1842 *, as certified that, by the custom of *London*, if there were an accumulation of interest upon an orphanage-share, the accumulation survived in the same manner as the original orphanage-share: and that the Lord Mayor and Court of Aldermen might again certify, to the Court, whether, if there were an accumulation of interest upon an orphanage-share, the accumulation survived in the same manner as the original orphanage-share; and that the hearing of the cause for further directions and costs †, might stand over until after the Lord Mayor and Court of Aldermen should have made their further certificate.

1843: 18th, 20th, 21st, and 29th March.

Custom of London. Certificate.

If the Lord Mayor and Aldermen have once certified as to the custom of *London*, the certificate is conclusive; and the Court never refers the same question a second time.

* The certificate was *dated* as above; but the Recorder did not certify, *ore tenus*, until the 28th.

† The order of the 9th of February 1842 reserved further directions and costs; but it was incorrect in that respect. Where a question is sent, as in the present case, to the Lord Mayor and Aldermen, or a reference is directed, to the *Master*, as to a particular fact, or an issue is directed to try such a fact, or a case is sent for the opinion of a Court of Law, the cause ought to *remain in the paper*, and, on the return of the certificate &c., to be brought on, not for further directions, but on the equity reserved.

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Mr. *Stuart*, Mr. *James Russell* and Mr. *Collins*, in support of the motion, produced several cases from the records of the city, which, they contended, showed that it was not the custom, of the city, that an accumulation of interest on an orphanage-share, survived in like manner as the original share. They added that the Court had the same power to send, to the Lord Mayor and Aldermen, for a second certificate, as it had to direct a new trial of an issue: and, in support of that proposition, they cited *Anaud* v. *Haniwood* (*t*), and *Tomkyns* v. *Ladbroke* (*u*), where Lord *Hardwicke* is reported to have said: "In that litigated case of *Blunden* v. *Barker* (in which I was of counsel), precedents were mentioned. First, *Hall* v. *Lumley*, so long ago as 1640; where the Court, dissatisfied with a certificate that had been given in 1635, sent it to be reconsidered; and, thereupon, a certificate was made directly contrary to the former."

Mr. *Boteler* and Mr. *Parry*, for the Plaintiffs, in support of the certificate, referred to *King*'s case in the reign of Henry 4th, *Page*'s case in the reign of *Elizabeth*, and to other cases extracted from the city records; and also to *Wilcocks* v. *Mayne*, *Ambrose* v. *Ambrose*, and *Jesson* v. *Essington* (*v*). They added that the only mode of trying the custom of *London*, was by the certificate of the Lord Mayor and Aldermen, and that, when the custom was once certified by the Recorder, the certificate was conclusive and binding on the Court for ever afterwards; and the Court was bound to acknowledge and act upon it, not only in the suit in which it had

(*t*) 2 Ch. Ca. 117.
(*u*) 2 Vez. 591.
(*v*) These three cases will be found in the Report of the hearing of the cause.

been made, but in all other suits in which the same custom might be afterwards brought into question. Com. Dig. (*x*), *Blacquiere* v. *Hawkins* (*y*), *Annand* v. *Honywood* (*z*). They added that, in the case cited from 2 Ch. Ca., the second certificate was required, not upon the point that had before occurred, but upon a new point.

The VICE-CHANCELLOR:

No precedent has been produced to me in which this Court, merely because it was dissatisfied with a certificate, has referred the same question, a second time, to the Lord Mayor and Aldermen. It is an entirely different thing from directing a new trial of an issue. The city of *London* has certain customs; and it has been a very ancient practice, when this Court wished to know what the custom was, to send the question to the Court of Lord Mayor and Aldermen, in order that they might certify as to the custom. But I never heard of a case in which this Court, when it has got an answer to the question, has sent back the matter to be reconsidered, merely because arguments were adduced to show that the answer was not satisfactory, that is, not a correct answer: and it is quite plain, from the copies of the orders in *Hall* v. *Lumley*, with which I have been furnished*, that no such thing was done in that case. It is true that, in that case, an order had been made for sending a case for the opinion of the Lord Mayor and Aldermen as to the custom; and it appears that there

(*x*) Tit. Certificate, vol. 2, p. 184, 3d edit.
(*y*) 1 Doug. 378; *see* Judgment. (*z*) 2 Freeman, 56.

* His *Honor* had directed Reg. Lib. to be searched for the orders in *Hall* v. *Lumley*.

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had been also a reference made, as to certain matters, to certain citizens, and that some of the parties were dissatisfied with what the referees had done; and, in consequence of that, a reference was directed to the *Master*; but it does not appear that any such thing was done as Lord *Hardwicke* is reported to have stated.

General credit is given, to the city, for knowing its own customs. And I must say that I should be extremely unwilling to make a precedent, in this particular case, for doing that which never has been done before and which I have not heard any authority for doing. Consequently I shall refuse the motion; but, as the Defendants may have been misled by the *dictum* in *Vezey*, I shall refuse it without costs.

Infant. Maintenance.

A freeman of *London* died intestate, leaving an infant son, who, on his father's death, became entitled to his orphanage-share of his father's personal estate, and also to other property. The infant was maintained, by his mother, from his father's death until his own death. Held that the mother was not merely entitled to be repaid what she had expended in the infant's maintenance, but to have a liberal allowance made to her, having regard to the whole of the infant's property; and that the amount was not to be paid out of the orphanage-share and the infant's other property, but wholly out of the former; that arrangement being most for the infant's benefit.

The motion having been disposed of, the cause came on to be heard on the equity reserved.

The question that was then discussed, arose under the following circumstances. *Joseph Aldridge* the younger, became entitled, on his father's death, not only to his orphanage-share (the income of which was stated to exceed 400*l.* a year), but also to real estates of considerable yearly value, and to a share of one-third of his father's personal estate under the Statute of Distributions. The Defendant *Ann Knott*, his mother, had maintained and educated him from his father's death

until his own death; and she and her second husband submitted, by their answer, that they were entitled to be reimbursed *the amount of the expenses of such maintenance and education* out of the stocks and funds in which the original orphanage-share of *Joseph Aldridge* the younger, and his share of his deceased sister's orphanage-share, and the accumulations thereof, had been invested, in case the Court should be of opinion that *Ann Knott* was not entitled to the whole of such stocks and funds.

Mr. *Boteler* and Mr. *Parry*, contended that the amount of the sums which had been expended in the maintenance and education of *Joseph Knott* the younger, ought not to be paid out of his orphanage-share alone, but ought to be apportioned between that share and his other property: and they referred to *Ambrose* v. *Ambrose*, in which the allowance for the maintenance and education of *Thomasin Ambrose*, the infant, was ordered to be paid out of the interest or proceeds and growing rents and profits of her late father's estates both real and personal: and also to *Wilcocks* v. *Mayne*, in which the allowance for maintenance was directed to be paid out of the increase of their respective *shares and estates*.

Mr. *Stuart*, Mr. *James Russell* and Mr. *Collins*, contended that *Ann Knott* ought not merely to be repaid the sums which she had actually expended in her son's maintenance and education; but that a liberal allowance ought to be made to her, having regard to the whole of the property to which her son was entitled, and that the amount ought to be paid wholly out of the stocks and funds in which his orphanage-share had been invested.

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They cited *Foljambe* v. *Willoughby* (*a*), where Sir *John Leach*, V. C., ruled that, where two funds are provided for the maintenance of an infant, the interest of the infant must determine which of the two funds is to be applied: and they added that, in *Ambrose* v. *Ambrose* and *Wilcocks* v. *Mayne*, the question, out of what part of the infant's property the allowance for his maintenance ought to be paid, was not contested.

The VICE-CHANCELLOR:

In the two cases that were mentioned by the Plaintiffs' counsel, it does not appear that the income of the orphanage-shares was sufficient for the maintenance of the infants: it does not appear what was the actual income. Besides, the question now raised, was not contested, nor could it be contested; for there were no parties to contest it.

I am now required to decide what ought to be done in a case where the matter is actually contested; and I think that the Court must be guided by the rule which Sir *John Leach* laid down in *Foljambe* v. *Willoughby*; and that, whenever it has to exercise a choice between

(*a*) 2 Sim. & Stu. 165. In that case, the infants were all living; but, in the present case, the infant was dead: therefore it is not easy to see how that case applied, in principle, to the present; for, the infant being dead, his interest was out of the question.

No authority was cited, probably none could be found, in support of the proposition contended for by the Defendants' counsel: namely, that although Mrs. *Knott* claimed to be allowed no more than the sums *which she had expended* in the maintenance of her *deceased* son, she was entitled to a *liberal* allowance, having regard to the whole of his property.

the different funds out of which an infant is to be maintained, it should hold that that fund belonging to the infant shall bear the burthen, which, in effect, is least beneficial to the infant, in the sense of his having the least dominion over it.

Then there is this to be observed: that, in computing what ought to be allowed out of the interest of the orphanage-share, the *Master* must have regard to the whole of the income which the child really had. Because the matter cannot be considered in the same way as if the infant had only the orphanage-share: but, as he was entitled to the rents and profits of an estate, and to a fund of personalty, which was absolutely his, and also to the orphanage-share, which would be his only on his attaining the age of 21, the sum to be allowed for his maintenance, must be settled with reference to all that he was entitled to.

By the order made on the hearing of the cause on the equity reserved, the Plaintiffs were declared to be entitled to the share of *Elizabeth Aldridge* which accrued, upon her death, to *Joseph Aldridge*, and to the accumulations (if any) upon the whole original and accrued shares of *Joseph Aldridge*: and it was referred, to the *Master*, to inquire and state what sum would be proper to be allowed, for the maintenance of *Joseph Aldridge*, from the death of his father to his own death, having regard to the whole of his fortune, with liberty to the *Master* to state special circumstances: and further directions and costs were reserved *.

* The Plaintiffs have appealed, to the *Lord Chancellor*, from the latter part of the above order.

1842:
18th January.

STUART *v.* LORD BUTE.

Insufficiency.
Defendant.
Answer.
Examination.
Partners.

A Defendant, who was required to set forth, in his answer to interrogatories, certain entries in the books of a firm of which he was a member, stated, in his answer, that the books were in the joint custody of himself and his copartners, and that he had asked their permission to inspect and make extracts from the books, to enable him to comply with the requisitions of the interrogatories, but that they had refused to permit him so to do. Held that the answer was insufficient; as the Defendant had not stated that there was any contract, between him and his copartners, which prevented him from inspecting the books, and making extracts from them, without their permission.

THE Court having decided that the answer and examination put in, by the Defendant Lord *Wharncliffe*, to the 4th, 5th, and 6th interrogatories, was insufficient*, his Lordship put in a further answer and examination stating, in effect, that the books and accounts of the partnership were in the joint custody of himself and of Lord *Ravensworth* and Mr. *Bowes* his copartners; and that, before putting in his further answer and examination, he had applied, to them, for permission to inspect and make copies of and extracts from the books and accounts of the partnership, in order to enable him to answer and comply with the requisitions of the interrogatories; but that they had refused and still did refuse to give him such permission.

The *Master* certified that the further answer and examination was insufficient with respect to the three interrogatories before mentioned: whereupon Lord *Wharncliffe* excepted to the certificate.

Mr. *Stuart* and Mr. *Parry*, in support of the exceptions, said that Lord *Wharncliffe* had shown, by his further answer and examination, that it was wholly out of his power to give the information which the inter-

* See *ante*, Vol. XI. p. 445.

rogatories required. They cited *Taylor* v. *Rundell* (*a*); and *Murray* v. *Walter* (*b*).

Mr. *Bethell* appeared in support of the certificate.

The VICE-CHANCELLOR:

It appears to me that enough has not been stated, in this case, to show in what respect permission was necessary, or that permission was at all necessary, to enable Lord *Wharncliffe* to inspect the partnership books. For anything that appears to the contrary on this examination, Lord *Wharncliffe* might have gone down to *Newcastle* and inspected the books, if he had thought fit to do so. He does not state that he and his copartners became partners under such a contract as disabled any one of them, without the express permission of the other two, to inspect the books or make extracts from them. Nothing of the kind is stated.

With respect to what is alleged to have taken place, in the year 1838, with regard to Mr. *Nicholas Wood* (*c*); I cannot comprehend how an order given by *A.*, *B.* and *C.*, being partners, to their agent or servant, can have the effect of giving up the right of the partners, unless there was some contract that it should be given up. One partner would, as a matter of course, have dominion over his agent or servant, though he was the agent or servant of the partnership. The effect of the order given, in 1838, to *Nicholas Wood*, was to prevent any *stranger* from inspecting the books; but I do not see that any order was given which would have the effect

(*a*) *Ante*, Vol. XI. p. 391; and 1 Craig. & Phill. 104.

(*b*) Ibid. 114.

(*c*) See *ante*, Vol. XI. p. 445.

1842.

STUART v. LORD BUTE.

of disabling Lord *Wharncliffe*, himself, from inspecting the books: and, if he had given an order as against himself, the same power which enabled him to give the order, would have enabled him to revoke it.

There may have been, for any thing that I know to the contrary, some contract between Lord *Wharncliffe* and his two partners, which, in effect, has disabled him from inspecting the books and making extracts from them without their permission. But there is no intimation of any such contract in any part of the examination; and, therefore, there was not any necessity for Lord *Wharncliffe* to apply, to his copartners, for permission to inspect and make extracts from the books of the partnership.

If Lord *Wharncliffe* had stated that he had gone to *Newcastle*, and had proceeded to examine the books; but that an opposition was made, I mean such an opposition as amounted to a civil representation, to his Lordship, that, if he persisted, force would be used, *that* would have been a very good reason for holding that he was not bound to do any thing more. But there is no such statement in his further examination. And, as no case is stated which shows that it was necessary for his Lordship to ask permission to inspect the books and that he did ask it and was refused, my opinion is that it does not sufficiently appear, on the examination, that his Lordship is justified in not complying with the requisitions of the interrogatories; and, consequently, I must hold that the further examination which he has put in is not sufficient.

STRICKLAND *v.* STRICKLAND.

1842: 27th January.

Pleading. Parties. Executors. Revivor.

If a Defendant dies having appointed two or more executors and all of them do not prove the will, it is sufficient for the Plaintiffs to revive the suit against those who prove.

EUSTACHIUS STRICKLAND, one of the Defendants, died, having appointed Sir *George Strickland* and *G. Meynell* his executors: but Sir *George* alone proved his will. The Plaintiffs revived the suit against Sir *George*, but not against *Meynell*.

Mr. *Shadwell*, for Sir *George Strickland* and Mr. *Meynell*, now moved that the Plaintiffs might revive, within 14 days, against both the executors, or that the bill might be dismissed as against them. He said that executors derived their title under the will, and, if one of them proved it, they all became the personal representatives of the testator.

Mr. *Bethell*, for the Plaintiffs:

As the Plaintiffs have revived the suit against the executor who has proved the will, they have done all that it is incumbent on them to do.

The *Vice-Chancellor* said that although, where *A.* and *B.* were appointed executors and *A.* alone proved, the probate enured to *B.*; yet the general rule was that it was sufficient to bring *A.* alone before the Court.

1842:
27th January,
8th February,
and
23d March.

Costs.
Exceptions.
Practice.

If exceptions to the *Master's* report as to scandal or impertinence are allowed, the Court, on the application of the successful party, will order the costs of the reference to the *Master*, and also the costs of the application, to be taxed and paid by the unsuccessful party.

EVERETT *v.* PRYTHERGCH.
STRICKLAND *v.* STRICKLAND.

IN *Everett* v. *Prythergch* (*a*), the Defendant excepted, to the bill, for scandal and impertinence; and the *Master* allowed some of the exceptions. The Plaintiff excepted to the report; and the Court allowed his exceptions.

In *Strickland* v. *Strickland*, the Plaintiff excepted, to the answer, for impertinence; and the *Master* allowed the exceptions. The Defendant excepted to the report; and the Court allowed his exceptions.

The Defendant then moved that the costs of the reference to the *Master*, and *also the costs of the application*, might be taxed and paid by the Plaintiff.

The *Vice-Chancellor*, at first, hesitated to make the order as to the costs of the application; but, after having been furnished, by Mr. *Bicknell*, the Registrar, with the order in *Everett* v. *Prythergch* (in which those costs, as well as the costs of the reference, were ordered to be paid by the Defendant, who was the unsuccessful party in that case), his *Honor* made an order according to the notice of motion (*b*).

(*a*) See *ante*, p. 365.

(*b*) In *Desanges* v. *Gregory*, *ante*, Vol. VI. p. 473, the costs of the application were not asked for.

HORE *v.* BECHER.

1842: 28th January.

Husband and wife. Reversionary interest. Release.

A single woman being entitled to an annuity secured *by bond*, married. Her husband executed a release of the annuity, and died, leaving his wife surviving. Held that, as he could release the security, he could release the annuity, so as to bind his wife.

Mistake. Release.

A. executed a bond to *B.* and *C.*, conditioned for payment of an annuity of 100 *l.* to *D.* for life, and assigned an annuity of 120 *l.* for the life of one *M.* and a policy of insurance for 700 *l.* on *M.*'s life, to *B.* and *C.*, upon certain trusts for further securing the annuity of 100 *l.*

M. died, and *A.* died shortly afterwards, having, as was then believed, received the 700 *l.* and applied it to his own use. Shortly afterwards, *D.*, in consideration of 500 *l.*, released *A.*'s personal representative and *B.* and *C.* from the annuity of 100 *l.* and the securities for it. Some years afterwards it was discovered that *A.* had placed the 700 *l.* in a bank, in the names of *B.* and *C.*, where it still remained. Held that the release, having been executed under a mistake, was inoperative, and that the 700 *l.* remained impressed with the trusts for securing the annuity of 100 *l.*

ROBERT BECHER executed a bond, dated the 4th of May 1813, to *A. Fraser* and *John Becher*, in the penalty of 2,000 *l.*, conditioned for securing an annuity of 100 *l.* a year, to *Mary Ann Dickenson*, spinster, during her life: and, by a deed of even date with the bond, he assigned an annuity of 120 *l.*, which had been granted to him for the life of *M. D.*, and also a policy of insurance for 700 *l.* on *M. D.*'s life, to the obligees in the bond, upon certain trusts for further securing the due payment of the annuity of 100 *l.* a year.

In April 1814, *Mary Ann Dickenson* married *John Turton*. In 1819 *Robert Becher*, the obligor in the bond, died intestate; and his brother, *Richard Becher*, took out administration to him. After *Robert Becher*'s death, the annuity of 100 *l.* became in arrear; and Mr. and Mrs. *Turton* threatened to commence proceedings at law and in equity against *Richard Becher*, as the personal representative of *Robert*, and against *Fraser* and *J. Becher*, as the trustees for securing the annuity,

1842.

HORE v. BECHER.

in order to recover the arrears and enforce the future payment of the annuity. The parties, however, afterwards came to a compromise; in pursuance of which, Mr. and Mrs. *Turton* executed a deed, dated the 24th of August 1819, and thereby, in consideration of 500*l.* paid to them by *J. Becher*, released *Fraser*, *J. Becher*, and *Richard Becher* as the administrator of *Robert*, from all claims and demands in respect of the annuity of 100*l.* or the securities for the same.

Fraser survived *John Becher*, and died in 1839. The Plaintiff was his executor. Mr. *Turton* also died; and, after his death, his widow married *Samuel Wood*.

The bill was filed against *Richard Becher* as the personal representative of *Robert*, and against Mr. and Mrs. *Wood*: and, on the cause coming on to be heard as a short cause, one question was whether it was competent, to Mr. *Turton*, to release his wife's annuity, except during the coverture.

Mr. *G. L. Russell* and Mr. *Hore*, appeared for the Plaintiff.

Mr. *Stuart* and Mr. *J. H. Palmer*, for Mr. and Mrs. *Wood*, said that all the payments of the annuity after Mr. *Turton's* death, were reversionary payments; and that a husband could not deal with the reversionary interest of his wife so as to bind her if she survived him; *Purdew* v. *Jackson* (*a*), *Honner* v. *Morton* (*b*), and *Stiffe* v. *Everitt* (*c*): that, if a husband could not *assign* his wife's reversionary interest so as to bind her if she survived him, he could not *release* it; for there was no

(*a*) 1 Russ. 1. (*b*) 3 Russ. 65.
(*c*) 1 Myl. & Cr. 37.

difference, in principle, between a release and an assignment, as the power to extinguish could not exist without the power to transfer: and that, in *Thompson* v. *Butler* (*d*), it was expressly decided that if a married woman had an annuity for life, a release by her husband did not bind her if she survived.

Mr. *Bethell* and Mr. *Hislop Clarke*, for *Richard Becher*, said that the cases cited related to *assignments* by the husband of the wife's reversionary interest; and, therefore, they did not apply to the present case; for, here, the question was, not as to the effect of an assignment but as to the effect of a *release* by the husband: that a distinction had been always made between a release and an assignment; and that no point was better settled than that an interest, though it could not be assigned, might be released.

The VICE-CHANCELLOR:

If a man gives a bond or a promissory note to secure an annuity to a single woman, and she afterwards marries, her husband may release the bond or note; and, if he releases the security, there is an end to the annuity.

In the case in *Moore*'s Rep. it does not appear how the annuity was secured. If it was secured on land, it is perfectly plain that the husband could not release it without the concurrence of his wife: in order to extinguish the annuity, she must have joined with him in levying a fine of the land.

The object of the suit was to have the rights and interests of the Defendants to and in certain Exchequer

(*d*) Moore's Rep. 522.

1842.

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bills, which had been purchased with proceeds of the policy on *M. D.*'s life, ascertained and declared by the Court.

The release of the 24th of August 1819, recited (as the parties then believed to be the fact) that, on *M. D.*'s death (which took place in 1816), *Robert Becher* received the money secured by the policy, from the insurance office, and converted it to his own use; and that he some time afterwards went to *India*, and died on his voyage home. In 1841, however, the Plaintiff accidentally discovered that the sum due on the policy, had been paid into *Hammersley*'s bank, to the account of *Fraser* and *J. Becher*, the obligees in the bond.

Mr. *Stuart* and Mr. *J. H. Palmer* said that Mr. and Mrs. *Turton* executed the release, under the erroneous impression, created by the recital in the deed, that the money received under the policy was gone; and that it was evident that they would not have executed the release, if they had known that the money was safely deposited in *Hammersley*'s bank; and, consequently, the release was inoperative, so far as the fruits of the policy were concerned.

Mr. *Bethell* and Mr. *Hislop Clarke* said that the question arose between co-defendants; and, as no bill had been filed to set aside the release, the Court must consider it to be a valid deed, and decide, as to the rights of the parties, accordingly.

The VICE-CHANCELLOR:

This case must be considered with reference to the recital, in the release, that *Robert Becher*, after the death of *M. D.*, received and converted to his own use,

the sum of 700*l.* secured by the policy, which was actually paid to him by the insurance office, without any knowledge of the assignment of the 4th of May 1813. It now turns out that that was an error in fact: and, therefore, the deed of August 1819, though it purports to be a release of the 700*l.*, can not be considered as operating on that sum. It is apparent, on the face of that deed, that the parties would not have taken the course which they adopted, if they had known that the 700*l.* was deposited in *Hammersley*'s bank, in the names of the trustees of the assignment of May 1813. The consequence is that the release was inoperative, and that the sum of 700*l.* still remains impressed with the trusts declared, by the assignment, for securing the annuity of 100*l.* a year.

Declare that, under the circumstances of mistake, the release dated the 24th of August 1819, is totally inoperative, and that the principal sum of 700*l.*, and the sum of 269*l.* 4*s.* 1*d.* being the interest thereof, together with the Exchequer bills in which those sums have been invested, are now subject to the trusts of the original deed of the 4th of May 1813.

1842:
10th Feb.

Solicitor. Privileged communications. Mortgagor and mortgagee. Discovery. Defendant.

A solicitor invested his client's money on a mortgage, and, by the client's desire, took the mortgage in his own name, without any trust being declared by the deed.
In a suit by a judgment creditor of the mortgagor, to redeem, against the solicitor and the mortgagor (who was out of the jurisdiction), held that the solicitor was privileged from disclosing the name of his client, and also the particulars of other mortgages of the property, which had been taken, by other clients of the solicitor, in their own names. Held, also, that the case was an exception to the rule that a Defendant who submits to answer, must answer fully.

JONES *v.* PUGH.

THE bill was filed, by a judgment creditor of the Defendant *Pugh* (who was out of the jurisdiction), to redeem a mortgage made, in October 1834, by *Pugh* to the other Defendant *Roy*, who was a member of the firm of *Roy & Co.* solicitors. It alleged that the mortgage of 1834, was made, to *Roy*, as a trustee, and that there were other mortgages on the property; and it sought a discovery of the names of the persons for whom *Roy* was a trustee, and of the names of the parties to and all the particulars of the other mortgages; and it required *Roy* to set forth a list of the deeds and other documents in his power, relating to the matters stated and charged.

Roy put in an answer to the bill, in which he admitted the matters alleged, but declined to give the discovery sought, or to set forth a list of the deeds &c., on the ground that he could not do so without committing a breach of professional confidence and duty; inasmuch as the clients of his firm were in the habit of entrusting him and his copartners with monies to be laid out on securities, sometimes in the names of the clients and sometimes in the Defendant's name, under a private trust and confidence that the names of the clients should not be disclosed. He added, that no trust was declared by the mortgage deed of 1834, but

the mortgage money was made payable to the Defendant absolutely, and he was authorized to give a good discharge for it, when paid, and to transfer the security; and that he had no knowledge as to that or any of the other mortgages, except what he had obtained in the course of his confidential employment as solicitor to the several mortgagees; and that the deeds &c. in his power, were their property.

The Plaintiff excepted to the answer, on the ground that the Defendant ought to have given the discovery and set forth the list required by the bill: and the *Master* allowed the exceptions. The Defendant then took exceptions to the report.

Mr. *Bethell* and Mr. *Cole* appeared in support of those exceptions; and

Mr. *G. Richards* and Mr. *L. Wigram*, in support of the report.

The *Vice-Chancellor* held that the Defendant would not have been bound either to give the discovery or to set forth the list, if he had availed himself of his professional character either by demurring or by pleading to the bill; but that, as he had thought proper to put in an answer, and as the answer was filed before the General Orders of August 1841 (*a*) came into operation, he was bound to answer fully: and, on that ground, his *Honor* over-ruled the exceptions to the *Master*'s report.

The *Lord Chancellor*, however, on appeal, reversed his *Honor*'s order, his Lordship being of opinion, on the

(*a*) The 38th Order allows a Defendant to protect himself, by answer, from answering any interrogatory to which he might have demurred.

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authority of *Harvey* v. *Clayton* (*b*), that the present case was one of the exceptions to the rule that a Defendant who answers at all, must answer fully (*c*).

(*b*) 2 Swanst. 221, note. (*c*) *See* 1 Phill. Rep. 96.

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Statute of Limitations. 3 & 4 *Will.* 4, c. 27. *Annuity. Trustee and cestui que trust.*

A testator who died in 1795, devised his real estates to trustees to sell, and out of the interest of the proceeds, and out of the rents of the estates until they should be sold, to pay certain annuities. No payment had been made in respect of any of the annuities for more than 20 years before the bill was filed; but the trustees entered into possession of the estates on the testator's death, and the surviving trustee continued in possession until about 11 years prior to the filing of the bill. Held that the Plaintiff's right to the annuities was not barred by the Statute of Limitations.

WARD *v.* ARCH.

EBENEZER WHITING, by his will dated the 4th of August 1795, gave the residue of his real and personal estate to *John Woods* and two other persons, their heirs, executors &c., in trust to sell and invest the proceeds in Government securities, and, out of the dividends thereof or the rents of his real estates until the same should be sold, to pay, to his wife, *Elizabeth Whiting*, for her life, an annuity of 300 *l.*, by quarterly payments, on the days therein mentioned, the first payment to be made on such of those days as should happen next after his death; and to pay, to the Plaintiff *Frances Ann Ward*, for her life, an annuity of 20 *l.*, in like manner; and to pay the remainder of the dividends and rents to *Elizabeth Whiting* for her life; and, after her death, to pay to the Plaintiff, *Frances Ann Ward*, for her life, a further annuity of 30 *l.*, the first payment to be made on such of the before-mentioned days as should happen next after *Elizabeth Whiting*'s death: and the testator gave all the residue and remainder of

his estate and effects, after payment of the annuities, to his four sisters.

The testator died on the 2d of September 1795. Upon his death the trustees entered into possession of his real estates: and his personal estate being wholly insufficient to pay *Elizabeth Whiting*'s annuity of 300 *l.*, they, as the bill alleged, paid her 100 *l.* a year, during her life, out of the rents of the real estates; but they never made any payment whatever, to the Plaintiff *Frances Ann Ward*, in respect of either of the annuities given to her by the will.

Elizabeth Whiting died on the 27th of March 1804; and the Plaintiff *Frances Ann Ward* was her executrix: but the trustees did not make any payment to her, in respect of the arrears of *Elizabeth Whiting*'s annuity, except that, shortly after that lady's death, they paid the Plaintiff 50 *l.* out of the rents of the estates.

John Woods survived his co-trustees, and continued in possession of the estates until his death. He died in 1826.

In May 1837, the bill was filed to have the trusts of the will carried into execution and to have the arrears of the three annuities raised by sale of the testator's real estates, and provision made for the future payment of the two annuities given to the Plaintiff *Frances Ann Ward*.

Some of the Defendants insisted, by their answers, that the Plaintiff's claim to the annuities and the arrears thereof, was wholly barred by the Statute of Limitations; or, at all events, that she could not claim

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any arrears of the annuities given to her, except for six years prior to the filing of the bill.

Mr. *Walker* and Mr. *Willcock*, for the Defendants who relied on the Statute of Limitations, said that the last payment in respect of the annuity of 300 *l.*, was made shortly after the year 1804: that an annuity was a legacy; and that, by the 42d section of the Statute of Limitations (3 & 4 Will. 4, c. 27), it was enacted that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land, *or in respect of any legacy*, should be recovered but within six years next after the same respectively should have become due: that *Frances Ann Ward*'s claim to the annuities of 20 *l.* and 30 *l.*, was barred by the 40th section of the Act, which enacts: that no action, suit or other proceeding shall be brought to recover any sum of money charged upon or payable out of land, *or any legacy*, but within 20 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same. *Sheppard* v. *Duke* (*a*).

Mr. *Bethell* and Mr. *Elderton*, for the Plaintiffs, said that the trustees entered into possession or receipt of the rents of the estates charged with the annuities, immediately after the testator's death; and that *John Woods*, the surviving trustee, continued in such possession or receipt until the year 1826: that, when the relation of trustee and *cestui que trust* was once constituted, the doctrine of adverse possession (which was defined by the third section of the Act) did not apply: that the trustees, by receiving the rents, must be considered to

(*a*) *Ante*, Vol. IX. p. 567.

have received the annuities; and their receipt was the receipt of their *cestuis que trust.* They referred to the 15th section of the Act, and also to the 25th, which enacts: that when any land or rent shall be vested in a trustee, *upon any express trust,* the right of the *cestui que trust,* or any person claiming through him, to bring a suit against the trustee or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of the Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

Mr. *G. Richards,* Mr. *Stuart,* Mr. *Hislop Clarke,* Mr. *Taylor* and Mr. *Freeling,* were the other counsel in the cause.

The VICE-CHANCELLOR:

The trustees were trustees to pay the annuities; and their possession of the estates out of which the annuities were directed to be paid, continued down to the year 1826; therefore it is plain that the objection to the bill founded on the Statute of Limitations cannot be supported.

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18th Feb.

LORD AMHERST *v.* THE DUCHESS DOWAGER OF LEEDS.

Will. Construction. Legacy.

Testator, by his will, gave an annuity of 1,000*l.* a year to his wife, for her life, and directed his plate and furniture at *H.* his family mansion, to be sold. By a codicil, he desired that his wife should be accommodated with any plate she might choose for her own use, and that an inventory should be made of it, and that it should be returned at her death: "and I give to her absolutely any one of my silver inkstands which she may select: I also give, to my dear wife, any part of the beds, bedding, linen, carpets, or other household furniture at *H.*, *which she may require for her own use*, as likewise any ward-robes or glass-cases at *H. according to her wish*; and I give to her, in addition to all other provisions, 400*l. per annum* during her life, *to be applied to the rent of any residence* she may choose to live at, and to be raised and paid in like manner as the annuity bequeathed to her by my will."

Held that the wife was entitled, *absolutely*, to such parts of the furniture as she might select; and that she was entitled to be paid the 400*l.* a year, although she had fixed her residence, with her son, at the family mansion.

THE late Duke of *Leeds*, by his will dated the 30th of July 1836, gave to his wife, *Charlotte*, Duchess of *Leeds*, the sum of 2,000*l.* and certain specific legacies: and he gave his freehold estates to the Plaintiffs, their heirs, executors &c., in trust as a fund for the discharge of his debts, and all mortgages and incumbrances which should affect the same at his decease, and his funeral and testamentary expenses and legacies, in aid of the residue of his personal estate; and upon trust, out of the surplus rents after defraying the interest of all charges thereon and all deductions and out-payments, to pay an annuity of 1,000*l.* a year to the Duchess, for her life, by quarterly payments, the first payment to be due at the end of three months after his decease; and, subject thereto, in trust for his son-in-law, *Sackville Walter Lane Fox*, for his life, and after his decease, in trust for his (the Duke's) grandson, *Sackville George Lane Fox*, for his life, with remainder to the first and other sons of *Sackville George Lane Fox*, successively, in tail, with remainders over: and he bequeathed his jewels and plate to the Plaintiffs,

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upon trust, as to such parts of his plate as *Sackville Walter Lane Fox*, or, in case of his decease, the trustees should, in his or their absolute and uncontrolled discretion, deem suitable and sufficient to be preserved for the use of the parties interested in his real estates under his will, and, as to the whole of his jewels, in trust to preserve and appropriate the same for the use and enjoyment of the persons who should, from time to time, become beneficially entitled to his freehold estates under his will, so as to be annexed as heir-looms thereto; and as to all his pictures, prints, cameos, intaglios, busts, statues, gems, medals, china, books and household goods and furniture at *Hornby Castle*, and as to all the monies to arise by the sale of such parts of his plate as should not be appropriated for the purpose of being preserved as heir-looms, and all the residue of his personal estate and effects, he bequeathed the same, to the Plaintiffs, in trust to convert the same into money, and to apply the proceeds, as the primary fund, in payment of his debts, funeral and testamentary expenses and pecuniary legacies, and to lay out the surplus in the purchase of lands to be settled to the same uses as he had declared of his freehold estates: and he directed the Plaintiffs, in the sale of any of his estates contiguous to or convenient to be enjoyed with his settled family estates in the North or West Ridings of *Yorkshire*, or of any of his plate or other effects at *Hornby Castle* thereby authorized or directed to be sold under any of the trusts or powers thereinbefore contained, to offer them, in the first instance, to the proprietor of *Hornby Castle* for the time being, on such terms as the Plaintiffs should think fair and proper; and he desired that, as soon as might be after his death, such arrangements might be made, with respect to his personal effects at *Hornby Castle* (which were of great value) as might be sufficient for their security and pre-

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LORD AMHERST *v.* THE DUCHESS DOWAGER OF LEEDS.

Will. Construction. Legacy.

Testator, by his will, gave an annuity of 1,000*l.* a year to his wife, for her life, and directed his plate and furniture at *H.* his family mansion, to be sold. By a codicil, he desired that his wife should be accommodated with any plate she might choose for her own use, and that an inventory should be made of it, and that it should be returned at her death: "and I give to her absolutely any one of my silver inkstands which she may select: I also give, to my dear wife, any part of the beds, bedding, linen, carpets, or other household furniture at *H.*, *which she may require for her own use*, as likewise any ward-robes or glass-cases at *H. according to her wish*; and I give to her, in addition to all other provisions, 400*l. per annum* during her life, *to be applied to the rent of any residence* she may choose to live at, and to be raised and paid in like manner as the annuity bequeathed to her by my will."

Held that the wife was entitled, *absolutely*, to such parts of the furniture as she might select; and that she was entitled to be paid the 400*l.* a year, although she had fixed her residence, with her son, at the family mansion.

THE late Duke of *Leeds*, by his will dated the 30th of July 1836, gave to his wife, *Charlotte*, Duchess of *Leeds*, the sum of 2,000*l.* and certain specific legacies: and he gave his freehold estates to the Plaintiffs, their heirs, executors &c., in trust as a fund for the discharge of his debts, and all mortgages and incumbrances which should affect the same at his decease, and his funeral and testamentary expenses and legacies, in aid of the residue of his personal estate; and upon trust, out of the surplus rents after defraying the interest of all charges thereon and all deductions and out-payments, to pay an annuity of 1,000*l.* a year to the Duchess, for her life, by quarterly payments, the first payment to be due at the end of three months after his decease; and, subject thereto, in trust for his son-in-law, *Sackville Walter Lane Fox*, for his life, and after his decease, in trust for his (the Duke's) grandson, *Sackville George Lane Fox*, for his life, with remainder to the first and other sons of *Sackville George Lane Fox*, successively, in tail, with remainders over: and he bequeathed his jewels and plate to the Plaintiffs,

upon trust, as to such parts of his plate as *Sackville Walter Lane Fox*, or, in case of his decease, the trustees should, in his or their absolute and uncontrolled discretion, deem suitable and sufficient to be preserved for the use of the parties interested in his real estates under his will, and, as to the whole of his jewels, in trust to preserve and appropriate the same for the use and enjoyment of the persons who should, from time to time, become beneficially entitled to his freehold estates under his will, so as to be annexed as heir-looms thereto; and as to all his pictures, prints, cameos, intaglios, busts, statues, gems, medals, china, books and household goods and furniture at *Hornby Castle*, and as to all the monies to arise by the sale of such parts of his plate as should not be appropriated for the purpose of being preserved as heir-looms, and all the residue of his personal estate and effects, he bequeathed the same, to the Plaintiffs, in trust to convert the same into money, and to apply the proceeds, as the primary fund, in payment of his debts, funeral and testamentary expenses and pecuniary legacies, and to lay out the surplus in the purchase of lands to be settled to the same uses as he had declared of his freehold estates: and he directed the Plaintiffs, in the sale of any of his estates contiguous to or convenient to be enjoyed with his settled family estates in the North or West Ridings of *Yorkshire*, or of any of his plate or other effects at *Hornby Castle* thereby authorized or directed to be sold under any of the trusts or powers thereinbefore contained, to offer them, in the first instance, to the proprietor of *Hornby Castle* for the time being, on such terms as the Plaintiffs should think fair and proper; and he desired that, as soon as might be after his death, such arrangements might be made, with respect to his personal effects at *Hornby Castle* (which were of great value) as might be sufficient for their security and pre-

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servation, and might tend to avoid any injury or inconvenience from their removal, should that become necessary, as far as might be consistent with the object of his will: and he appointed the Plaintiffs and *Sackville Walter Lane Fox* his executors.

The testator made a codicil, dated the 29th of May 1838, which was partly as follows: "I desire that my dear wife, should she survive me, may be accommodated with any plate, for her own use, of whatever description she may choose, from *Hornby Castle* *, having an inventory of the same, to be returned at her death to my executors, and then to go as before directed by my will; and I give to her, absolutely, any one of my silver or gilt inkstands which she may select, and also my satin-wood secretaire in the first drawing-room at *Hornby* aforesaid: I also give, to my dear wife, *any part* of the beds and bedding, linen, carpets, curtains, chairs, dining-room or other tables, sofas, ottomans and chaiselongues, *or other household furniture at Hornby aforesaid, which she may require for her own use*, and likewise any ward-robes or glass-cases at *Hornby* aforesaid, *according to her wish*; and I give to her, in addition to all other provisions, 400 *l.* per annum, during her life, *to be applied to the rent of any residence she may choose to live at*, and to be raised and paid in like manner, and in all respects, as the annuity bequeathed to her by my will: and, as to so much of the furniture and effects at *Hornby Castle*, made saleable by my will as part of the primary fund for the payment of my debts, as are not hereby withdrawn from such disposition but will remain liable to be sold for that purpose,

* *Hornby Castle* did not pass by the will; but was entailed on the Marquis of *Carmarthen*, the testator's son and heir.

it is my will that my trustees, before making any other disposition thereof, shall have the same valued in such manner as they shall deem fair and proper, and offer them to my son, the Marquis of *Carmarthen*, if he shall survive me, at a deduction of 20 per cent. from such valuation; he to signify his acceptance or refusal of such offer within three months next after my decease: and, in all other respects, I confirm my said will."

The testator died on the 10th of July 1838, leaving the Marquis of *Carmarthen*, his heir, and the other persons named in his will, surviving.

The bill, after setting forth the will and codicil, alleged that doubts had arisen as to the rights and interests of the Dowager Duchess of *Leeds*, in and to the household goods and furniture and other household effects at *Hornby Castle* at the time of the testator's death, and as to her right to the annuity of 400*l.* bequeathed by the codicil: that, shortly after the testator's death, the household goods and furniture and other household effects at *Hornby Castle*, were valued, as being subject to probate duty, and that the household goods and furniture were valued at 8,062*l.* 13*s.* 6*d.*, the linen at 517*l.* 8*s.* 9*d.*, and the china and glass at 932*l.* 9*s.*, amounting in all to 9,512*l.* 11*s.* 3*d.*: that, since the testator's death, the Duchess had fixed her residence at *Hornby Castle*, and had written to the Plaintiff *William Alderson*, as one of the executors and trustees of the will, informing him that she had so done, and desiring that, therefore, the annual sum of 400*l.* might be paid to her account at her bankers: that the Duchess, in exercise of the power given to her by the codicil, had made a selection of part of the household goods and furniture and other household

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effects, and claimed, under the codicil, to be absolutely entitled to the parts so selected; and that she had sent, to the executors, an inventory of the articles not selected by her, with a valuation of such articles, such valuation being as follows: household goods and furniture 1,680*l.* 12*s.*, linen 34*l.*, and china and glass 38*l.*, amounting in all to 1,752*l.* 12*s.*: that the Defendant *Sackville Walter Lane Fox* alleged that the selection so made by the Duchess, was an undue exercise of the power given to her by the codicil; and that she was not entitled to retain so large a quantity of the goods, furniture and other effects; and that *Hornby Castle*, from its magnitude, was not a residence suitable to her income and means of living; and that it was not a suitable residence for her within the meaning of the testator; and that she was entitled to select so much only of the goods, furniture and other effects as was sufficient for a suitable residence for her; and that she was entitled for her life only, and not absolutely, to that portion of the goods, furniture and effects; and that the annual sum of 400*l.* bequeathed by the codicil, was to be paid for the rent of a residence for her, and was not to be paid to her absolutely, or applied in any other way for her benefit: but that the Duchess claimed to be absolutely entitled to the 400*l.* per annum, without any reference whatever to her habitation or the rent thereof.

The bill prayed that an account might be taken of the household goods, furniture and other effects at *Hornby Castle* at the time of the testator's death, and of the value thereof, and that the rights and interests of the Duchess and all other parties in the same under the will and codicil, might be ascertained and declared by the Court; and that the right of the Duchess to the

annual sum of 400 *l.* bequeathed by the codicil, might be ascertained and declared in like manner.

The Duchess in her answer said that, in exercise of the power given to her by the codicil, she directed Mr. *Dowbiggin* (an upholsterer in *London*) to make, as her agent and on her behalf, a proper selection of the household goods and furniture and other household effects at *Hornby Castle* suitable to her rank; and that such selection was made accordingly and adopted by her; and that she had, for the present and since the late Duke's death, fixed her chief residence at *Hornby Castle*, but she had not any legal right to remain there; and that she occasionally resided in *London* and also in *Scotland*.

Dowbiggin deposed that he had been instructed, by the Duchess, to select, from the household goods, furniture and effects in *Hornby Castle*, such as were proper for furnishing a house suitable to her rank, and that the Duchess, or some person on her behalf, furnished him with an extract from the codicil, as his guide in making the selection; and that he made the selection in accordance with his said instructions and with the extract so furnished to him.

Mr. *G. L. Russell*, for the Plaintiffs, stated that the questions were, first, whether, as the Duchess of *Leeds* had selected by far the most valuable parts of the furniture at *Hornby Castle*, she had not made an unfair use of the power given to her by the codicil:

Secondly, whether she was entitled to the selected articles, absolutely or for her life only; and,

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Thirdly, whether, as she had taken up her residence at *Hornby Castle*, she was entitled to be paid the 400*l.* a year.

Mr. *G. Richards* and Mr. *Lloyd*, for the Duchess, said, first, that, by the codicil, the Duchess was empowered to take any part of the beds, bedding &c. at *Hornby Castle* which she might require for her own use, and any ward-robes and glass-cases according to her wish; that the words, "according to her wish," were more general even than the words, "for her own use;" and that the only restrictive effect of those latter words, was that the Duchess was not to take any of the beds, bedding &c. which she did not require for her own use; and, that it was not alleged that she had done so. *Walker* v. *Walker* (*a*).

Secondly, that the Duchess was entitled, absolutely, to the articles of furniture which she had selected: for the testator had directed, with respect to the plate of which the Duchess was to have the use, that an inventory should be taken of it, and that it should be returned after her death, and then go as directed by his will; but when he gave her, as he did in the very next sentence, such part of his furniture as she might require for her own use, he did not direct that an inventory should be taken of it, or that it should be returned after her death: and,

Thirdly, that though the late Duke had expressed the purpose for which the 400 *l.* a year was to be applied, he had not imposed a condition, on the Duchess, to

(*a*) 5 Madd. 424.

apply it to that purpose*; and that she had not taken up her abode, permanently, at *Hornby Castle*, but had, merely, gone there on a visit to her son, the present Duke.

Mr. *Stuart* and Mr. *Shee*, for *Sackville Walter Lane Fox* and his children, said that the Duchess had exercised her power of selecting from the furniture at *Hornby Castle*, to an excessive extent: that, instead of selecting "any part," she had taken nearly the whole of it; for the furniture was valued at 9,512 *l.*, and all that remained was of the value of 1,752 *l.* only: that the late Duke never contemplated that the Duchess would reside with her son at *Hornby Castle*; but supposed that she would live in a house worth 400 *l.* a year; and, when he empowered her to choose such of the furniture as she might require for her own use, he meant such of the furniture as would be necessary to furnish a house the rent of which would be 400 *l.* a year; whereas the Duchess had selected furniture suitable to *Hornby Castle*: that she had not proved that the furniture which she had chosen, was such as she required for her own use; and that it ought to be referred, to the *Master*, to inquire whether that was the case.

Secondly, that the Duchess was entitled, only for her life, to the articles which she had selected; for, by the codicil, she was to have merely the use of them, and, after her death, they were to be sold:

Thirdly, that the purpose for which the 400 *l.* a year was given, was incorporated with the gift; and as the

* If a legacy is given to purchase a ring, the legatee is not bound to lay out the money in purchasing a ring.

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Duchess had, as appeared from her letter to the Plaintiff *Alderson*, fixed her residence at *Hornby Castle*, the purpose for which the 400*l.* a year was given, had failed; and, consequently, the gift could not take effect.

The VICE-CHANCELLOR:

I do not require any reply.

First of all, the late Duke, by his will, gives all his freehold estates to Lord *Amherst* and his co-devisees, upon trust out of the surplus rents, after keeping down the interest on the mortgages thereon and making certain other deductions, to pay to his wife, that is the present Duchess Dowager, or her assigns, during her natural life, an annuity of 1,000*l.* sterling, clear of all taxes and deductions, by equal quarterly payments, the first payment to be due at the end of three calendar months next after his decease, and such annuity to be paid proportionably up to the day of her decease; and subject to such annuity, in trust for Mr. *Sackville Walter Lane Fox*, and his children. Then he gives his copyhold and leasehold estates to the trustees, upon trusts corresponding, as far as the law permits, with the trusts declared of his freehold estates. Next he gives his jewels and plate to the trustees, in trust, as to such part of his plate as they should think proper to preserve for the use of the parties interested in the surplus of his real estates under his will, and as to the whole of his jewels, to permit the same to go as heir-looms to his devised estates; and, as to such part of his plate as his trustees should not think proper to preserve, in trust to sell it and apply the proceeds as part of his residuary personal estate: then he gives certain family portraits and his furniture in his house in *St. James's-square*, to the trustees, upon the same trusts as he had before declared of his

ewels and such part of his plate as should be preserved. Then he gives all his pictures, prints, cameos, intaglios, busts, statues, gems, medals, china, books and household goods and furniture at *Hornby Castle*, and all the residue and remainder of his personal estate, to Lord *Amherst* and his co-trustees, upon trust to sell and convert the same into money, and to apply the proceeds, as the primary fund, in the discharge of his debts and funeral and testamentary expenses and pecuniary legacies, and in exonerating his devised estates from mortgages, and to invest the ultimate residue in the purchase of lands to be settled to the same uses as he had before declared of his devised estates. And he directs his trustees, in the sale of any of his estates contiguous to or convenient to be enjoyed with his settled family estates in the North and West Ridings of *Yorkshire*, or of any of his plate or other effects at *Hornby Castle* thereby authorized or directed to be sold under any of the trusts or powers thereinbefore contained, to offer them, in the first instance, to the proprietor of *Hornby Castle* for the time being, on such terms as his trustees should think fair and proper: and that, as soon as might be after his decease, such arrangements should be made, with respect to his personal effects at *Hornby Castle*, which were of great value, as might be sufficient for their security and preservation, and might tend to avoid any injury or inconvenience from their removal, should that become necessary. I mention that because it seems to afford help in construing the codicil.

The codicil, so far as it is necessary to be stated for the present purpose, is as follows: "I desire that my dear wife, should she survive me, may be accommodated with any plate, for her own use, of whatever

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description she may choose, from *Hornby Castle* aforesaid, having an inventory of the same, to be returned at her death to my executors, and then to go as before directed by my will: and I give to her, absolutely, any one of my silver or gilt inkstands which she may select, and also my satin-wood secretaire in the first drawing-room at *Hornby* aforesaid: "I also give to my dear wife, any part of the beds and bedding, linen, carpets, curtains, chairs, dining-room or other tables, sofas, ottomans and chaiselongues or other household furniture at *Hornby* aforesaid, which she may require for her own use; and likewise any ward-robes or glass-cases at *Hornby* aforesaid, according to her wish."

The first question is whether it is not apparent, from these words, that the Duke meant to give to the Duchess absolutely, what he professed to give to her. When I see that he commences with a limited gift, namely, of the use of the plate at *Hornby Castle*, and then changes the phrase, and says:—"I give to her, absolutely, any one of my silver or gilt inkstands which she may select, and also my satin-wood secretaire," and then goes on to say: "I also give to my wife any part of the beds and bedding," I cannot but think that the fair effect of the words is to give her, absolutely, any of the enumerated articles which she might require for her own use. Especially as I find that that very sentence terminates in this manner: "and likewise any ward-robes or glass-cases at *Hornby* aforesaid, according to her wish." Now, whether the words, "according to her wish," had reference to some wish before expressed or to such wish as she might thereafter express, it clearly appears to me that the whole sentence describes an absolute gift to the Duchess. And I think so more particularly, because I observe, in the latter part of the

codicil, these words: "and as to so much of the furniture and effects at *Hornby Castle* made saleable by my will as part of the primary fund for the payment of my debts, as are not hereby withdrawn from such disposition but will remain liable to be sold for that purpose," (plainly showing that he conceived that the prior part of the codicil had the effect of withdrawing, what might be taken by the Duchess, from the disposition made by the will), "it is my will that my trustees, before making any other disposition, shall have the same valued in such manner as they shall deem fair and proper, and offer them to my said son, the Marquis of *Carmarthen*, if he shall survive me, at a deduction of 20 per cent." Now that is a material variation from the mode of disposition directed by the will; and, in my opinion, the passage which I have last read, amounts to this, namely that, in the first place, the Duchess was to take what she might require, and the residue was to be delivered to the son, the present Duke, provided he chose to pay for them less by 20 per cent. than the sum at which they should have been valued. It seems to me, therefore, that the fair construction is that, in the first place, the late Duke did mean to subtract from the disposition made, by his will, of the furniture at *Hornby Castle*, such articles as the Duchess should select, and, in the next place, such articles as the present Duke should be willing to purchase at four-fifths of the valuation that should have been made of them.

If the parties think that the Duchess Dowager has selected articles that did not come within the description of: "beds and bedding, linen, carpets, curtains, chairs, dining-room or other tables, sofas, ottomans and

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chaiselongues or other household furniture," there must be an inquiry as to that point, before I can express any opinion upon it.

Then the next question is with respect to the annuity of 400*l.* a year. The testator says: "And I give to her, in addition to all other provisions, 400*l.* per annum, during her life, to be applied to the rent of any residence she may choose to live at, and to be raised and paid in like manner, in all respects, as the annuity bequeathed to her by my will." The Duke had directed, by his will, that the annuity of 1,000*l.* a year, should be paid to the Duchess, down to the time of her decease, by four quarterly payments. Now the payment to the Duchess must be made first; and those words which are thrown in: "to be applied to the rent of any residence," show only that what was passing in the Duke's mind, was that there might not be that family arrangement which has taken place, and that the Duchess might be obliged to seek a residence for herself: therefore, he directs, not that the trustees shall provide a residence for her and apply the 400*l.* a year in paying the rent of it; but that the 400*l.* a year shall be paid to the Duchess, leaving her to apply it; and I cannot but think that the Duke must have been aware that that might happen which has happened. At all events there is nothing, either in the will or in the codicil, which shows that he considered it as certain that the Duchess Dowager and the present Duke would not reside together.

My opinion is that the Duchess is entitled, absolutely, to the beds and other specified articles of furniture at *Hornby Castle* which the codicil empowers her to select;

and that she is also entitled to receive the annuity of 400*l.*, whether she resides at *Hornby Castle* or elsewhere.

If, as I before said, it is contended that the Duchess has selected articles which she had no right to select *, there must be a reference to the *Master* before I can decide that question.

END OF PART III. VOL. XII.

ERRATA.

In the marginal note, *ante*, p. 178, for *absolute*, read *sole*; and for *passed*, read *did not pass*.

In the margin of the report of *Brydges* v. *Branfill*, *ante*, pp. 369 et seq., *for* 1841, *read* 1842.

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

LLOYD *v.* JONES.

1842:
19th February.

Mortgagor and mortgagee. Interest.

A mortgagee in possession, who becomes overpaid pending a suit to redeem, will be charged with interest on the balance, from the date of the report, and on the rents subsequently received by him, from the respective times when those rents were received.

THE bill in this cause was filed, against a mortgagee in possession, to redeem the mortgage.

At the time when the Defendant put in his answer, the rents and profits which he had received, were not sufficient to cover the amount due to him for principal and interest; but, pending the proceedings in the *Master*'s office under the decree, he received further rents and profits; in consequence of which a balance of 64*l.* was due from him at the date of the report.

On the cause coming on for further directions,

Mr. *Wakefield* and Mr. *Koe*, for the Plaintiff, insisted that the Defendant ought to be charged with interest on all the sums which he had received on account of rents and profits, since he had been overpaid. They cited *Quarrell* v. *Beckford* (*a*); *Burton* v. *Todd* (*b*); *Wilson* v. *Metcalfe* (*c*).

(*a*) 1 Madd. 269.
(*b*) Sugd. Vendors, Appendix, No. 20; and 1 Swanst. 255.
(*c*) 1 Russ. 530.

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Mr. *G. Richards* and Mr. *Cockerell*, for the Defendant, said that, in the cases cited, the principal and interest had been satisfied before the bill was filed; and that there was no authority for charging a mortgagee with interest, where he had been overpaid in the progress of the suit.

The *Vice-Chancellor* said that he had no authority to charge the Defendant with interest prior to the date of the report; but ordered him to pay interest at four per cent. on the 64 *l.* from that time, and an account to be taken of the sums subsequently received by him, and interest to be charged on those sums, at the same rate, from the times when they were received.

HOLLIS *v.* BRYANT.

1842: 22d February and 2d May.

Jurisdiction. Insolvent debtor. Act of 1 & 2 Vict. c. 110. Debtor and creditor. Receiver.

A MOTION was made, in this cause, for a receiver of the rents of certain real estates in *Kent*, *Surrey* and *Sussex*, of which the Defendant *Bryant* was in possession, as absolute owner thereof, and for an injunction to restrain him from continuing to receive the rents.

An affidavit made, by the Plaintiff's solicitor, in support of the application, stated as follows: that, in 1839,

The assignee of an insolvent debtor, under 1 & 2 Vict. c. 110, being unable to recover an estate belonging to and in the possession of the insolvent, owing to the existence of an old commission of bankrupt against the insolvent (which, however, had been long since abandoned, in consequence of all the creditors under it having compromised and released their debts), is entitled to maintain a suit in Chancery against the insolvent and the assignee in bankruptcy, for the recovery of the estate, and for a receiver of the rents in the mean time.

Where a creditor puts in force, against his debtor, the compulsory clauses of 1 & 2 Vict. c. 110, the Insolvent Debtors' Court has no power to compel the debtor to file a schedule of his property.

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the Plaintiff recovered judgment against *Bryant* in an action on a promissory note for 60 *l.*: that, at the commencement of the action and when the judgment was obtained, *Bryant* was and had been for nearly thirty years, and still continued a prisoner for debt within the rules of the Queen's Bench prison: that, in the belief that he had not any real or personal property which could be made available by legal process in execution of the judgment, the deponent, as the Plaintiff's attorney, sued out a *ca. sa.* against *Bryant*, and lodged a detainer against him with the marshal of the prison, and charged him in execution upon the judgment; and he was still detained in the custody of the marshal, upon such execution of the Plaintiff and also of various other creditors to a large amount: that he had been and still was resident, not within the walls of the prison, but at large within the rules, and appeared to be living at considerable expense: that the Plaintiff, not being able to obtain any further satisfaction of his debt, caused application to be made, under the provisions of the Act of the 1st & 2d Vict.*, to the Court for the Relief of Insolvent Debtors in England, for the appointment of him, the Plaintiff, to be assignee of the estate and effects of *Bryant* under and according to the said statute: that the Court granted a rule, to be served upon *Bryant* and his detaining creditors, to show cause, on a certain day, why such appointment should not be made: that the rule was duly served accordingly; and, upon the application to make it absolute, *Bryant* opposed it, on the ground that he was not within the Act, inasmuch as a commission of bankruptcy had issued against him some time back, *and was still pending and being acted upon, and operating upon all his property*: that, notwithstanding,

* C. 110.

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the Court appointed the Plaintiff assignee of *Bryant's* estate and effects, under the statute, and all his estate and effects were still vested in the Plaintiff as such assignee: that, since the appointment of the Plaintiff as such assignee, *Bryant had refused to file any schedule of his property* in the Court for Relief of Insolvent Debtors, or to give the Plaintiff or the deponent any information respecting the same: that, shortly after the appointment of the Plaintiff as such assignee, the deponent, as the Plaintiff's solicitor, caused notices of such appointment to be served on *Bryant's* tenants, in consequence of which, two of them refused to pay the rent due from them to *Bryant*, and *Bryant* thereupon commenced actions against them for the rents due, and such actions were still pending and being prosecuted: that a commission of bankrupt was issued against *Bryant* *, under which he was found a bankrupt: that the deponent had inspected the proceedings under the commission, and it thereby appeared that *Bryant*, in various proceedings, opposed the commission and insisted upon the illegality thereof and endeavoured to defeat the same; and that, in the course of such proceedings, he filed various affidavits in which he deposed that he was not a bankrupt: that, after much litigation in respect of the validity of the commission, the creditors under the commission held a meeting, on the 31st of October 1827, at which they came to a compromise with *Bryant*, and agreed to accept certain sums of money in satisfaction of their debts, and, on being paid those sums, to consent to the commission being superseded: that it appeared from the proceedings under the commission, that no proceedings had been taken thereunder since 1828, and the assignees

* It was stated, in another affidavit made in support of the motion, that the commission was issued in 1810.

appointed under it were dead; and the Defendant *Belcher* had been, some time since, appointed official assignee to the commission*; but, by the proceedings under it, it did not appear that such appointment was made at the instance of any creditor under the commission: that the deponent, on the Plaintiff's behalf, obtained an appointment, for the 20th of April 1841, for the examination of *Bryant* under the commission: that *Bryant* attended the meeting, but refused to be examined, as to his estate and effects or otherwise under the commission, at the instance of the Plaintiff or of *Belcher*, on the ground that the Plaintiff was not a creditor or interested under the commission; and, in consequence of such refusal, the Commissioner of the Court of Bankruptcy before whom the meeting took place, refused to proceed with the examination, and directed *Belcher* not to take any proceedings under the commission except at the instance of a creditor who had proved a debt under it: that Mr. *Bennett*, who attended the meeting as solicitor to the commission, stated to the deponent that he well knew that *Bryant* had a release from all his creditors under the commission, and that he, *Bennett*, had seen it, but that *Bryant* would not produce the same to disturb the commission, for purposes best known to himself: that, in consequence of the refusal of the Commissioner to proceed under the commission except at the instance of the creditors who had proved debts under it, the deponent addressed circular letters to those creditors, with a view to ascertain if any of them could be produced for that purpose; and he also had interviews with the representatives of several of such creditors, who were long since dead,

* By 1 & 2 Will. 4, c. 56, s. 39, all then existing London commissions of bankrupt, were removed into the Court of Bankruptcy established by that Act.

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and urged them to take the necessary proceedings under the commission to obtain payment of their respective claims, if the same were not already paid and satisfied: that several of them stated their readiness to prosecute such claims; but, after examining their papers and inquiring into the matter, it appeared that their debts had been satisfied and discharged, and they did not interfere any further with respect to *Bryant's* estate; and the deponent verily believed, from the result of the interviews with the creditors, that no further proceedings would be taken in their behalf: that deponent believed, from the correspondence which had taken place, and the interviews which had been had with the parties interested under the commission, that all the creditors who had proved their debts under it, had been long since satisfied, and that *Bryant* had then in his possession a good and sufficient release or other discharge to him, in respect of the debts which had been proved under the commission; and that none of the creditors would further prosecute the commission, or interfere in any manner with *Bryant's* estate: that deponent believed, from the result of the correspondence and interviews with the creditors under the commission, that *Bryant* refused to produce the release or to give any information respecting it, for the purpose of remaining in the possession of his estates, and preventing the same from being made available to the payment of the debts which he had incurred subsequently to the date of the commission.

Mr. *Anderdon* and Mr. *Terrell* now moved for the injunction and receiver.

Mr. *Wakefield* and Mr. *Steere* opposed the motion, for the Defendant *Bryant*, on the ground that the Court

of Chancery had no jurisdiction in the case; but that the Plaintiff ought to seek relief either in the Court of Review or in the Insolvent Debtors' Court. They added that there was no instance in which the assignee of a bankrupt or insolvent, had been allowed to sue the bankrupt or insolvent*. They cited *Nias* v. *Adamson* (*a*), *Crofton* v. *Poole* (*b*), and *Drayton* v. *Dale* (*c*).

Mr. *Lewis* appeared for the Defendant *Belcher*.

The VICE-CHANCELLOR:

In this case the Plaintiff cannot obtain any relief in the Court of Bankruptcy, because he is incapable of coming in under the commission. Neither can he obtain any relief in the Insolvent Debtors' Court, because the commission of bankrupt against *Bryant* is still in force (*d*); and *Bryant* will not take any steps either to

* The Plaintiff was suing *Belcher* as well as *Bryant*, *Belcher* being the legal owner of the property sought to be recovered.

(*a*) 3 Barn. & Ald. 225.

(*b*) 1 Barn. & Adol. 568.

(*c*) 2 Barn. & Cress. 293.

(*d*) The 40th sect. of 1 & 2 Vict. c. 110, enacts; "That where the order vesting the estate and effects of any such prisoner in the provisonal assignee of the said Court, in pursuance of the provisions of this Act, shall be or become void, by reason of such prisoner being declared bankrupt within such period as above mentioned, or being an uncertificated bankrupt at the time of such order, the said order shall, nevertheless, together with the petition of such prisoner, if any, remain of record in the said Court: and the said Court shall and may require such prisoner to file his schedule, and shall and may cause such prisoner to be brought up, to be dealt with according to this Act, and all things to be done thereupon, or preparatory thereto, as in

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obtain his certificate, or to get the commission superseded; and all the creditors who proved their debts under the commission, are incapacitated from prosecuting it, as they have, long since, come to a compromise with *Bryant*, and released him from their debts. This, therefore, seems to me to be a case in which the Plaintiff has a right to seek relief in this Court, under the 51st sect. of the 1st & 2d Vict. c. 110, which enacts: "that it shall be lawful for the assignee or assignees of any such prisoner, and such assignee or assignees is and are hereby empowered to sue, from time to time as there may be occasion, in his or their own name or names, for the recovery, obtaining and enforcing of any estate, effects, or rights of such prisoner, but in trust for the

other cases, according to this Act; and the said Court shall and may, at any time when it shall seem fit, appoint other assignee or assignees in such case, in the same manner as in other cases; and that if, at any time after such vesting order shall have been made, such prisoner shall obtain his certificate under any such fiat in bankruptcy, the rights, powers, title and interest of the provisional assignee and other assignee or assignees appointed under this Act, in, over and respecting any property, real or personal, whatsoever, remaining to such prisoner after the obtaining of such certificate, or thereafter in any way coming to him, and under or in pursuance of the warrant of attorney to be executed by such prisoner under the provisions of this Act, shall, from and after the obtaining of such certificate, be the same as if the vesting order made under this Act had been valid at the time of making thereof: provided always, that nothing herein contained shall be construed to affect the title, rights and interests of the assignees under any such fiat in bankruptcy, or to alter or diminish the effect of any such certificate as aforesaid, but that the title, rights and interests of such last-mentioned assignees, and the benefit of such certificate to such prisoner, shall be the same, to all intents and purposes, as if this Act had not been made."

benefit of the creditors of such prisoner, according to the provisions of this Act, and to give such discharge and discharges to any person or persons who shall be respectively indebted to such prisoner as may be requisite; and to make compositions with any debtors or accountants to such prisoner, where the same shall appear necessary, and to take such reasonable part of any such debts as can, upon such composition, be gotten, in full discharge of such debts and accounts; and to submit to arbitration any difference or dispute between such assignee or assignees and any person or persons for or on account or by reason of any matter, cause, or thing relating to the estate and effects of such prisoner: provided nevertheless, that no such composition, or submission to arbitration, shall be made, nor any suit in equity be commenced, by any assignee or assignees, without the consent in writing of the major part in value of the creditors of such prisoner, who shall meet together pursuant to a notice of such meeting, to be published at least 14 days before such meeting in the London Gazette, and also in some newspaper most usually circulated in the neighbourhood of the place where such prisoner had his or her last usual residence before his or her imprisonment as aforesaid, nor without the approbation of the said Court or of one of the commissioners thereof." This then being, as I think, a case to which that section applies, the only remaining question for me to decide is whether the property in respect of which the Plaintiff asks a receiver, is so circumstanced as that I ought to grant his application.

Now I find the property in this situation. *Bryant*, the insolvent, is in the possession of the property; but he has no interest in it so long as the order of the Insolvent Debtors' Court vesting all the insolvent's pro-

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perty in the Plaintiff, remains in force. The whole legal estate is vested in *Belcher*, which disables the Plaintiff from obtaining the relief which he is entitled to; and, as the party in possession has no interest (except in the surplus which may remain after all his debts are paid), I am of opinion that this is a case in which I ought to grant a receiver.

On the 20th of April, a motion was made, before the *Lord Chancellor*, on behalf of *Bryant*, to discharge the *Vice-Chancellor*'s order.

On the 2d of May his Lordship delivered the following judgment.

The LORD-CHANCELLOR:

This was an appeal from an order of the *Vice-Chancellor* appointing a receiver in this cause.

The facts of the case were these. Several years ago a commission was issued against Mr. *Bryant*. Mr. *Bryant* contested that commission; and, at last, a compromise was entered into between him and his creditors. Mr. *Bryant* paid a certain sum of money, which the creditors accepted; and no further proceedings have ever since taken place under that commission. It appears that the original assignees under the commission, are dead; and, a short time since, the proceedings under that commission were transferred to the Court of Bankruptcy; and Mr. *Belcher*, one of the Defendants on the present record, was appointed official assignee. Those are the circumstances so far as relates to the bankruptcy. The present Plaintiff, Mr. *Hollis*, was a creditor of Mr. *Bryant*; not a creditor under the bankruptcy;

but a creditor upon a transaction arising many years afterwards. Not being able to obtain payment of his debt, he brought an action, in the Common Pleas, against Mr. *Bryant*, and recovered judgment in that action. Mr. *Bryant* had, for many years of his life, lived within the rules of the Queen's Bench prison; and, in consequence of that, a detainer was lodged against him. Upon the lodging of that detainer, the Plaintiff, Mr. *Hollis*, applied to the Insolvent Debtors' Court, to be appointed assignee under the provisions contained in the Insolvent Debtors' Act which are of a compulsory nature. That application was resisted by Mr. *Bryant*, who attended by counsel; but the result was that the order was made and Mr. *Hollis* was appointed assignee. Some controversy arose at the bar as to whether or not there was any vesting order. It is quite clear that there was a vesting order, though it was contended that that vesting order was not valid; but, in fact the order never was discharged. It was a subsisting order, and, therefore, when Mr. *Hollis* was appointed assignee under the Act of Parliament, all the right and interest, subject to the existing bankruptcy, which Mr. *Bryant* had in any part of his property, vested in that assignee, that is, in the Plaintiff, Mr. *Hollis*. Mr. *Hollis* endeavoured to compel Mr. *Bryant* to file a schedule under the Insolvent Debtors' Act; but he was not successful in that application; and, in truth, the Act of Parliament is defective in that particular; for there are no adequate means by which the Commissioners of the Insolvent Debtors' Court, can, under those clauses of the Act, compel a party to file a schedule. Mr. *Hollis* attempted also to recover his debt by some application under the bankruptcy; but, not being a creditor under the commission, his applica-

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tion in that respect was unsuccessful. It appears, therefore, that Mr. *Hollis* had no alternative but to proceed in the manner in which he has done.

The argument at the bar and the point principally raised and contested, indeed the sole point, was this, that he ought not to have instituted the present suit, but that he ought to have gone on in the Insolvent Debtors' Court.

Now, adverting to the 40th section of the 1st and 2d Vict., c. 110, it is quite clear that he could not proceed in the Insolvent Debtors' Court; because, in consequence of the existence of the commission, the assignment which was made to Mr. *Hollis*, was not valid for any beneficial purposes to him. It was valid so far only as it enabled him to conduct certain inquiries with respect to the state of Mr. *Bryant*'s property. But it is expressly provided that, though not valid in its original operation, so as to give the party any means of obtaining payment of his debt, it is valid for the purpose of inquiry; and, when a certificate under the commission is obtained, then the order becomes valid for all purposes. Therefore until a certificate is obtained under the commission, or until the commission is superseded, that order is, in point of fact, for all beneficial purposes to Mr. *Hollis*, suspended: it was inoperative. But it is perfectly clear that Mr. *Bryant* will not take steps to supersede his commission: nor will he take steps for the purpose of obtaining his certificate; and, therefore, that vesting order remains, for all beneficial purposes, suspended. That being the case, what alternative had Mr. *Hollis* to pursue, but to institute a proceeding like the present?

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I am of opinion the proceeding was perfectly regular; and the order for the appointment of a receiver, follows as a matter of course.

Consequently the *Vice-Chancellor*'s order must be affirmed with costs.

STORER *v.* JACKSON.

1842: 22d February.

Practice. Injunction.

The Court refused to hear a motion to dissolve an injunction, pending a motion, of which the Plaintiff had given notice, for production of documents mentioned in a schedule to the answer, no unnecessary delay having taken place in giving notice of the latter motion.

MOTION to dissolve an *ex parte* injunction on the coming in of the answer, pending a motion, of which the Plaintiff had given notice, for production of documents mentioned in the schedule to the answer.

The *Vice-Chancellor* refused to hear the motion to dissolve, until the motion for production had been disposed of: because the contents of the documents were part of the discovery which the Plaintiff was entitled to extract from the Defendant, and the Plaintiff had not been guilty of any unnecessary delay in giving notice of his motion; so that it was not a mere contrivance to avoid the motion to dissolve.

Mr. *Bethell*, for the Defendant.

Mr. *G. Richards* and Mr. *Mylne*, for the Plaintiff.

1842:
7th March.

Practice.
Order.
Contempt.

A. and *B.*, each, instituted a creditors' suit against *C.*, the executrix of their deceased debtor.
A decree having been made in *A.*'s suit, *C.* obtained an order staying *B.*'s suit.—*C.* being in contempt for want of answer in that suit, the order was drawn up in the other suit.

TURNER *v.* DORGAN.

MYATT *v.* DORGAN.

BOTH the above suits were instituted, by creditors, for the administration of the estate of the same deceased debtor; and, a decree having been obtained in the first, the Defendant, the executrix of the deceased, moved to stay the proceedings in the second suit.

The *Vice-Chancellor* granted the motion; but, as the Defendant was in contempt for want of answer in the second suit, a question arose as to the form in which the order ought to be drawn up.

His *Honor*, following an order made, under similar circumstances, in a cause of *Weeks* v. *Williams* (with a copy of which the Registrar had furnished him), directed the order to be drawn up as an order in the first suit, that being the suit in which the party moving was not in contempt.

Mr. *G. Richards* and Mr. *Glasse*, for the motion.

Mr. *Bethell* and Mr. *Berrey*, for *Myatt* the Plaintiff in the second suit.

ELLIOTT *v.* FISHER.

1842: 11th March.

Will. Conversion.

Testator devised a real estate to his daughter for life, and then to be sold and the proceeds divided amongst her children. One of her children died in her lifetime, having devised his share of the estate to his son. Held that the deceased child took his share of the estate as personalty in reversion expectant on his mother's death; and, consequently, that his executrix, and not his son, was entitled to it.

THOMAS WATMAN, being seised of an estate, partly freehold and partly copyhold, called *The Gale Estate*, and having surrendered the copyhold part to the use of his will, devised the estate to his daughter *Ann Elliott*, for her life, and then to be sold by his trustees thereinafter named, and the proceeds divided amongst all the children of his said daughter, share and share alike, excepting *Bella Fisher*; and he appointed *John Biglands*, *John Chambers*, and *William Donald*, trustees of his will.

The testator died in 1818. His eldest son, *Robert Watman*, was his heir at law and customary heir.

On the testator's death his daughter *Ann Elliott* entered into possession of the *Gale* estate; and continued in possession of it until her death. She had ten children including *Bella Fisher*. All of them, except *Thomas*, who was her eldest son, survived her. He, by his will dated the 19th of September 1840, gave, to his son the Defendant *Thomas Robert Watman Elliott*, and his heirs, all his, the testator's, share of the estate called *Gale*, as willed to him by his late grandfather *Thomas Watman*, subject to his mother's life interest therein; and he appointed the Plaintiff *Fanny Elliott* sole executrix of his will. He died shortly after the date of his will. His mother, *Ann Elliott*, died on the 5th of November 1841.

Two of the questions raised by the bill, were whether the legal estate in fee in the *Gale* estate, was vested

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under the will of the testator *Thomas Watman*, in the children of *Ann Elliott*, exclusive of *Bella Fisher*; or whether, it descended, on the death of that testator, to his eldest son, *Robert Watman*.

Another and the principal question was whether, regard being had to the will of the testator *Thomas Watman*, the *Gale* estate was to be considered as converted into personalty or not.

The cause was heard as a short cause.

Mr. *Walker* and Mr. *Phillips* appeared for the Plaintiffs.

Mr. *De Gex*, for the Defendant, *Thomas Robert Watman Elliott*, who was entitled to a share of the *Gale* estate under the specific devise in the will of *Thomas Elliott*, his father, in case it was not converted by the original testator's will, said that *Thomas Elliott* died in the lifetime of his mother *Ann Elliott*, and, consequently, before the period of conversion had arrived.

Mr. *Schomberg* appeared for other Defendants.

The VICE-CHANCELLOR:

Thomas Elliott took his share of the estate, under his grandfather's will, as personalty in reversion expectant on the death of his mother, and, therefore, the Plaintiff *Fanny Elliott* is entitled to it as his personal representative.

Thomas Watman did not devise the *Gale* estate to his trustees in trust to sell, but merely directed his trustees to sell it after the death of his daughter *Ann Elliott*; and, consequently, the legal estate in fee, did not pass by his will, but descended to his eldest son *Robert Watman*.

DAUBENY *v.* COGHLAN.

1842: 14th and 15th March.

Will. Construction. Mistake. Evidence.

Testator bequeathed 5,000*l.* in trust for all and every the child and children of his niece, *C. A.*, and *of his nephew, the late James C.*, to be divided amongst them, if more than one, share and share alike, and, if there should be but one such child, then in trust for such only child; the shares of sons to be paid to them at 21, and the shares of daughters at that age or on their marriage.

The testator never having had a nephew named *James C.* who had died leaving issue, the children of his late nephew *Henry C.* (who was the only one of his nephews who had left issue) claimed to be interested under the bequest: upon which the *Master* was directed to inquire what persons were meant by the testator. It appeared (amongst other things) from the evidence before the *Master*, that the testator had had four nephews surnamed *C.*: that two of them were named *James*, and another *Henry*: that one *James* died 40 years ago, and the other, about 16 years before the date of the will, and that *Henry* died about 10 years before the date of the will, and was the only nephew of the testator who left issue: and the *Master* found that *his* children were the persons intended.

The Court, however, on hearing exceptions to the report, held that the finding was not warranted by the evidence, and referred it back to the *Master* to review his report.

Practice.—Exceptions.—Report.

If the Court, on hearing exceptions to a report, considers the evidence produced before the *Master*, not to be sufficient to warrant his finding, it will not allow the exceptions simply; but will allow the exceptions, and refer it back to the *Master* to review his report: thereby giving the unsuccessful party an opportunity of laying further evidence before the *Master*.

ANDREW COGHLAN, late of the city of *Bath*, a Lieutenant-colonel in the army, died on the 31st of March 1837, having given, by his will dated the 14th of that month, the sum of 5,000*l.* stock to the Plaintiffs and the Defendant, *Sarah Coghlan*, his widow, in trust to pay and apply or assign and transfer the same to or amongst all and every the child and children of his niece *Catherine Anthony, and of his nephew the late James Coghlan*, to be divided between and amongst them, if

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more than one, share and share alike, and, if there should be but one such child, then to such only child; the shares of such of them as should be sons to be paid to them on their attaining the age of 21 years, and the shares of such of them as should be daughters to be paid to them at such age or on their being married, which should first happen.

The testator never had a nephew named *James* who died leaving issue; and, in consequence of the uncertainty thence arising, as to the persons who were intended to take by the description of the children of the testator's late nephew *James Coghlan*, the bill was filed by two of the executors, against *Sarah Coghlan*, the testator's widow and executrix, the children of *Catherine Anthony*, and the children of *Henry Coghlan* deceased, who was the only nephew of the testator who had left issue, to have the trusts of the will carried into execution under the direction of the Court.

The cause was first heard on the 1st of June 1838, and was reheard on the 7th of May 1839. By the decree made at the rehearing, the *Master* was directed to inquire and state what persons were meant, by the testator, by the description of all and every the child and children of his niece, *Catherine Anthony* and of his nephew, the late *James Coghlan*.

The *Master* certified that a pedigree of the testator's family, together with a state of facts and certain affidavits and extracts from registers of baptisms &c. had been laid before him on the part of the Defendants, *Mary Coghlan* and *Charlotte Coghlan* (the children of the testator's late nephew, *Henry Coghlan*), and that, in opposition to the claim of *Mary Coghlan* and *Char-*

lotte Coghlan, certain affidavits had been laid before him on the part of the Defendants, *Michael Anthony*, *Susan Anthony* and *Louisa Mary Anthony* (the children of the testator's niece, *Catherine Anthony*), and that it appeared, from the pedigree and evidence, that there were only two nephews of the testator of the name of *James Coghlan*, namely, *James*, the son of the testator's brother *Charles*, and *James* the son of the testator's brother *James*; and that both of them died long before the testator, that is to say, *James* the son of *James*, died about 40 years ago, an infant and unmarried, and *James*, the son of *Charles*, died in the month of June 1821, having married one *Ann Henderson*, but leaving no issue; wherefore the *Master* was of opinion that the testator clearly made a mistake when he coupled, with his gift to the children of his niece *Catherine Anthony*, the gift to the children of *his late nephew James Coghlan*. The *Master* further certified that it also appeared, by the pedigree and evidence, that the testator had no nephew by the name of *Coghlan* who left children, except his nephew *Henry*; and that the testator was, in various ways, made acquainted with the fact that his last-mentioned nephew had left children: and therefore, if it was to be presumed, as the *Master* thought it must be, that the testator meant to benefit some other of his great nephews and nieces besides the children of his niece *Catherine Anthony*, he could only effect that intention by coupling, with her name, the children of his late nephew *Henry*; and, as the children of *Henry* were the only persons capable of taking under the said bequest, the *Master* found that the children of *Henry* were the persons meant, by the testator, in so much of his said bequest, as purported to refer to the child and children of his late nephew *James*: and, as to the children of *Henry*, the *Master* found that,

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on the 7th of November 1815, *Henry* married *Maria Mitchell*, and was never married to any other person; and that, by such marriage, he had five children and no more, namely, *James*, *Mary*, *Henry*, *Charlotte* and *Elizabeth*, three of whom only were living at the testator's death, namely, *Mary*, *Henry* and *Charlotte*; and that *Henry* the son, died on the 28th of May 1839; and that *Mary* was married to the Defendant *Joshua Nolan*; and that *Charlotte* was born on the 23d of September 1821.

The Defendants, the children of *Catherine Anthony*, excepted to the report on the following grounds: first, that no sufficient evidence had been laid before the *Master*, that there were only two nephews of the testator of the name of *James Coghlan*: secondly, that no sufficient evidence had been laid before the *Master* that the testator clearly made a mistake when he coupled, with the gift to the children of his niece *Catherine Anthony*, a gift to the children of his nephew *James Coghlan*: thirdly, that no sufficient evidence had been laid before the *Master* that the testator had no nephew of the name of *Coghlan* that had left children, except his nephew *Henry*; and, even if sufficient evidence had been laid before the *Master* of that fact, the same would not have warranted the *Master* in coming to the conclusion that the testator intended to benefit the children of his nephew *Henry*: fourthly, that no sufficient evidence had been laid before the *Master*, that the children of the testator's nephew *Henry*. were the persons meant by the testator in so much of his bequest as purported to refer to a child or children of his late nephew *James*: and, fifthly, that no evidence had been laid before the *Master* that the testator was aware, at the time of making his will, that his nephew *James*, the son of his

brother *James*, had died without leaving any children or child him surviving.

An affidavit, made by *Sarah Coghlan*, the testator's widow, in support of the state of facts carried into the *Master*'s office on behalf of the children of *Henry Coghlan*, was observed upon in the course of the argument and of the judgment. It was to the following effect. That the testator's nephew *James*, the son of his brother *Charles*, died in *London* about 16 years before the date of the testator's will, without having had any child, *to the best of the deponent's knowledge and belief*: that the testator had another nephew, named *Henry*, who was the son of the testator's brother *James Coghlan*, and that *Henry* died at *Dublin* in August 1827, leaving issue three children, *as deponent had heard and believed*, that is to say, *Mary*, *Henry*, and *Charlotte*, him surviving: that, to the best of deponent's knowledge and belief, the testator saw his nephew, *Henry*, but once, namely, in *Ireland*, some time in the year 1809 or 1810, but, in which year, the deponent could not then recollect; at which time the said *Henry*, the nephew, was not married and had not been married: that, at or about the period last before mentioned and subsequent thereto, the testator frequently told the deponent that it was his intention to bequeath, by his will, to his nephew *Henry* the houses at *Tooting* mentioned in the pleadings, because *Henry*, being a lawyer, knew how to manage such property better than any of his other relations; or the testator made use of words to that or the like effect: that the testator, as the deponent verily believed, was aware that his nephew *Henry* had died leaving children surviving him; but the number, ages, and persons of such children the deponent knew were personally unknown to the testator,

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who was also aware, *as the deponent believed*, that his other nephew, *James Coghlan*, died without leaving any children or child him surviving: that *she believed* the testator was aware of the deaths of his nephews *James* and *Henry* soon after they respectively died: that the only occasions upon which the deponent heard the testator express any intention of naming his nephew *Henry* in his will, happened in the year 1809 or 1810 as before mentioned, when the testator told deponent that he would bequeath to *Henry* the houses at *Tooting*: that the testator himself gave instructions to his solicitor to prepare his will, which, the deponent believed, the solicitor did from a former will of the testator, which last-mentioned will was returned to the testator at his desire by the solicitor, and the same was subsequently destroyed by the testator: that the ingrossment of the will was sent to the testator by his solicitor, and that the testator kept the same in his possession for two or three days, and then wrote a note to his solicitor, stating he had read the will and could not otherwise but approve of it, and that he had sent for two friends to be present at the execution of it as witnesses thereto, and had appointed a certain hour the following day for the purpose, at which time the testator duly executed the same will: that the testator, though weak in body, was perfectly sound in mind, and very circumstantial in the directions he gave to his solicitor respecting his will and his conversations as to the amount of his property; and that the testator, before he executed his will, read the same over to the deponent and asked her if she approved of the same, and stated that, if she did not approve thereof, it was not too late to alter it: *that she was perfectly satisfied, in her own mind, that the name of the testator's nephew James, was inserted in the will, by mistake instead of Henry, although the deponent was*

unable to account for such mistake, except that the christian name of the testator's brother, the father of the said *Henry*, who died about 40 years ago, being *James*, some confusion of names or persons might have arisen in the mind of the testator at the time of making his will: that neither the testator nor the deponent discovered that the name of *James* was inserted in such will when the same was executed by the testator, and when he previously read the same to the deponent as before mentioned: that the testator had another nephew of the surname of *Coghlan*, other than the said *James* and *Henry* (that is to say) *Edmund Blennerhasset Coghlan*, the son of the late Colonel *Edmund Coghlan*, a brother of the testator, who died about five years ago, in the lifetime of the testator, without having been married: that she never heard the testator, upon any occasion, express any intention to bequeath, by his will, to his nephew *Henry* or to his children, any interest in the sum of 5,000 *l.* stock, which was, by the testator's will, bequeathed to or in trust for the child and children of the testator's niece *Catherine Anthony* and of the testator's nephew *James Coghlan*: that the testator was very much displeased with the conduct of his nephew *James*, who held a commission in the same regiment, but not at the same time, as the testator; and which commission the testator procured for him; but his conduct, whilst in the regiment, so much displeased the testator that he refused to interest himself for his said nephew when he subsequently got into difficulties: that she believed the testator would not have given anything, by his will, to his nephew *James*, had he been living at the time the testator made his will; but whether the testator would have made any bequest in favour of a child or children of his said nephew *James*, the deponent could not say as to her belief or otherwise: that she was not aware

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that the testator's nephew *Henry* displeased the testator by his conduct in any way, except by marrying a person whom the testator considered beneath him in station of life: that so strong was the impression, on the deponent's mind, that the testator had named his nephew *Henry* as a legatee in the will, that, soon after the death of the testator, she wrote and sent a letter to the testator's niece, *Catherine Anthony*, apprising her of the death of her uncle, and requesting to be informed of the exact ages and names of her children, and the names and ages of the children of her deceased brother, whose christian name the deponent stated, in her letter, she thought was *Henry*; and, in such letter, the deponent requested *Catherine Anthony* not to delay giving in the names of the children, as they must be sent to the executors: that, soon after the death of the testator's nephew *Henry*, Captain *Edmonds*, the paymaster of the regiment in which the testator held a commission, wrote a letter, to the testator, to apprise him of the death of *Henry*, and to suggest that the testator should do something, by his will, for his, *Henry*'s, family; which suggestion the testator and the deponent considered Captain *Edmonds* was not warranted in making; and the testator treated it as an act of interference, by Captain *Edmonds*, in the private affairs of the testator, not warranted by their acquaintance; and accordingly he did not answer the letter as the deponent verily believed.

Sir *C. Wetherell* and Mr. *Lovat*, in support of the exceptions:

First: this is not a case in which extrinsic evidence is admissible to show who was the person intended by the testator*. Where a person is known by a name which

* The exceptions were grounded not on the inadmissibility, but on the insufficiency of the evidence.

he does not properly bear, and a legacy is left to a person of that name, then evidence is receivable to show who was the party the person intended. But, in the present case, the object is to strike out the name of one person and to substitute the name of another person for it: and, for that purpose, extrinsic evidence is not admissible. *Delmare* v. *Rebello* (*a*); *Holmes* v. *Custance* (*b*); *Miller* v. *Travers* (*c*).

Secondly: supposing that this was a case in which evidence was admissible, still the evidence that was produced before the *Master* was not sufficient to support the conclusion to which he has come: for it appears that the testator had two nephews named *James*; one the son of his brother *Charles*, and the other the son of his brother *James*, both of whom were dead at the date of the will; but there is no *positive* evidence to show that the testator knew that either of them was dead without issue. Therefore the description in the will is correctly applicable to the children of either of those two nephews: and this is nothing more than a case in which the legatees are well described, but it turns out that there are no persons answering the description. It appears, from the affidavit of the testator's widow, that the testator never saw his nephew *Henry* more than once, and that was as long ago as 1809 or 1810; and that the expressions which he used in favour of *Henry*, had reference only to the houses at *Tooting*.

Mr. *Bethell* and Mr. *Chandless*, in support of the report:

The description in this case, is not a description of a nephew; but of the children of a nephew. The

(*a*) 3 Bro. C. C. 446. (*b*) 12 Ves. 279. (*c*) 8 Bing. 244.

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bequest is not to an individual by name, but to persons answering a particular description. There is, it is true, no person fully answering that description; but there are persons answering nine-tenths of it. If the bequest had been to *James*, we admit that we could not have contended that *Henry* was meant: but the gift is to the children of a late nephew; therefore the testator must have intended to designate a nephew who was dead and had left children. The testator, however, had no nephew who had died leaving children, except his nephew *Henry*. *James* died 16 years before the will was made; and, as the testator interested himself about him, it may be fairly concluded, independently of the evidence, that he knew that *James* had not left any issue. It is plain then that the testator made a mistake in the christian name of the nephew whose children he intended to benefit: for it would be absurd to say that he intended to benefit persons whom he knew did not and never could exist.

The doctrine of this Court is that, if a testator is shown to have known certain facts and circumstances, but expresses himself in a manner which is at variance with that knowledge, you have a right to say that those expressions must have been used by some accidental mistake. The evidence is abundantly sufficient to show that there has been a mistake in the christian name of the father of the claimants. In every other respect, they correctly answer the description; for they are the children of the testator's nephew *Coghlan*.

In *Blundell* v. *Gladstone* (*d*), the Court decided on the principle which we are contending for, although it

(*d*) *Ante*, Vol. XI. p. 467; and 1 Phill. 279.

was a much stronger case against the application of that principle, than this case is: for, there, the description applied partly to one person and partly to another: and, consequently, there was a competition between two rival claimants: but, here, there is no competition, for there is no person *in esse* or who can come into *esse* who can answer the description. The description, therefore, applies to nobody: it is, if taken strictly, the description of an impossible person. And, that being the case, the testator either must have made some mistake in point of language, or have laboured under some erroneous impression when he made the bequest in question. Here the claimants are the children of a nephew of the testator, and of a nephew who bore the name of *Coghlan* and was the only nephew of the testator who bore that name at the date of the will, or who had left children; and, independently of the evidence, the testator must be presumed to have known those facts: for every testator is presumed to know the state of his family. The *Master*, therefore, was warranted in coming to the conclusion at which he has arrived, and the exceptions which have been taken to his report, must be over-ruled.

Mr. *Wilbraham* and Mr. *Walpole*, appeared for the Plaintiffs, the executors of the testator's will.

THE VICE-CHANCELLOR:

This appears to me to be a reasonably plain case.

We should, first of all, look at the very words of the will, and see whether it is not evident, on the face of it, that this testator chose to make his will, to a certain extent at least, in the dark.

He gives a sum of 5,000*l.* stock, to the trustees of

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his will: "in trust to pay and apply, or assign and transfer the same to or amongst all and every the child and children of my niece *Catherine Anthony* and my nephew, the late *James Coghlan*."

Then certain words follow which show, or lead to the inference at least, that, at the time when the testator made his will, he was ignorant whether the individuals who were made the objects of his bounty were really in existence or not. He says: "To be divided between and amongst them, if more than one, share and share alike, and, if there shall be but one such child, to such only child." Those words are evidence of an intention to decide in defiance of knowledge.

Now there are two circumstances which throw the matter into doubt; one is that the father of the children who claim, was named *Henry*, and the other that *James*, who was the son of *Charles*, died without issue. Why then might not the testator as much have forgotten the one fact as the other? How am I to know that he forgot one more than the other? If he forgot both, it was as reasonable for him, *primâ facie*, to devise in favour of the unknown children of *James* the son of *Charles*, as in favour of the unknown children of *Henry*. There is nothing whatever, on the face of the will, which at all tends to show that the testator forgot one of the facts more than the other: and the presumption rather is that he would be aware of the fact that the father of the children who claim, was named *Henry*, than that he would be aware of the fact that the son of *Charles*, who died 16 years before the will was made, had died without children. There is nothing whatever in the will from which I can collect that the testator knew one fact more than the other. He might have forgotten both.

Then, with respect to the evidence which has been given: it is of the loosest and most unsatisfactory nature. I do not, however, mean to impeach the veracity of Mrs. *Coghlan*. On the contrary, it appears to me that the very diffuse way in which she has spoken, shows that she meant to empty, as it were, all her mind on the subject into the affidavit. But she has stated things which appear to me to be very extraordinary: for she says that the testator read over the will to her; asked her the particular question whether she approved of it or not, and said that, if she did not, it was not too late to alter it. She does not state what answer she gave, but it is quite plain that she did approve of it. Now, if by the statement which she makes, namely, that the testator read the will over to her, she wishes to have us understand that she was aware of every portion of the will, or, at any rate, of that particular portion of it which is now under consideration, it is most extraordinary that, with the knowledge which she says she had, in her own mind, that *Henry* was meant, she should never have suggested it. That seems to me to be most extraordinary.

I must say that it appears to me to be much more likely that the testator knew at the time when he made his will (more especially in a case where I find a bequest made to individuals in so general a way as to show that the testator was not aware whether they were *in esse* or not), that *Henry* was the name of the father of the children who claim, than that he knew of the fact (in the sense of having it present to his mind) that *James* had died without children, that is, that *James* who died 16 years before the will was made.

Upon the whole, my opinion is that there is nothing whatever which enables me to say there is any more

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mistake in this case, than there is a mistake when a person gives to the children of *A.*, and it turns out that *A.* has no children.

When the judgment was concluded, a discussion arose between Sir *C. Wetherell* and Mr. *Bethell*, as to whether the Court ought to allow the exceptions simply, or to refer it back to the *Master* to review his report. Upon which,

The VICE-CHANCELLOR said:

It has been the habit of the Court, where a report has been made upon certain evidence, to consider that the parties might have been able to bring forward more evidence than that which has satisfied the *Master*, but abstained from doing so because they found that the *Master* was satisfied with that which they did bring forward. Unless, therefore, it can be made out to me that there can not be any further evidence adduced, I rather think that I should best comply with the rule of the Court, if I were to send it back to the *Master* to review his report.

In a case where the Court refers it to the *Master* to inquire whether there is a good title to an estate, a discussion frequently arises, before the *Master*, as to some particular fact; and the parties, in support of the title, bring forward some evidence which satisfies the *Master*; and the *Master* then reports that the title is a good one. The question is then brought before the Court, upon exceptions to the *Master's* report: and, if the Court is of opinion that the *Master* ought not to have reported in favour of the title, or, in other words, that the evidence was not sufficient, what injustice would it

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be to prevent those who, but for the intimation of the *Master*'s opinion in their favour, might have brought forward further evidence, from bringing forward that evidence. The order therefore which I shall make in this case, is, let the exceptions be allowed (that is, with reference to the evidence that was laid before the *Master*), and refer it back to the *Master* to review his report.

THE PROVOST AND SCHOLARS OF QUEEN'S COLLEGE, OXFORD *v.* SUTTON.

1842: 18th March.

Legacy. Specific legacy. Mistake.

A legacy was given to the Provost and *Fellows* of Queen's College. The proper name of the corporation was "The Provost and *Scholars*." Held that the Provost and Scholars were entitled.

Testator bequeathed, amongst other stock-legacies, 30,000 *l.* consols to the Provost and Fellows of Queen's College, to be by them expended, within three years after his death, in the purchase of such books for the use of, and to be added to the library of the College, as the Provost and Fellows for the time being, should, in their discretion, think fit: and, in a subsequent paragraph, he directed that if, at his decease, he should not have a sufficiency of stock standing in his name to answer the several stock-legacies aforesaid, his executor should purchase and make up the deficiency out of his residuary estate. The stock standing in the testator's name at his death, was sufficient to answer the bequest to the College. Held that that bequest was specific.

THE Rev. *Robert Mason*, D. D., a member of Queen's College, *Oxford*, by his will dated the 25th of September 1833, bequeathed, to the Provost and *Fellows* of Queen's College, in the University of *Oxford*, the sum of 30,000 *l.* three per cent. consolidated bank annuities, to be by them expended, within the space of three years next ensuing the date of his decease, in and for the purchase of books, for the use of and to be added to the library of the said College, as they, the said Provost and *Fellows* of the said College for the time being, should, in their discretion, think fit. The testa-

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tor then gave several other stock-legacies; and, towards the conclusion of his will, directed as follows: "And I will and direct that if, at the time of my decease, I shall not have a sufficiency of bank annuities standing in my name to answer the several stock-legacies aforesaid, my executor hereinafter named shall purchase and make up such deficiency by and out of the residue of my real and personal estate." He then gave all the residue of his real and personal estates to the Defendant, and appointed him sole executor of his will.

The testator died on the 7th of January 1841.

His personal estate was more than sufficient to pay the legacies bequeathed by his will; and he had stock in the three per cent. consols sufficient to answer the bequest to the College.

The bill, which was filed by the Provost and *Scholars* of Queen's College (which was the proper corporate name of the College), prayed that the Defendant might be decreed to transfer the 30,000*l.* consols to the Plaintiffs.

The Defendant, in his answer, stated that, upon his being applied to, by the Plaintiffs, to transfer the stock to them instead of the Provost and *Fellows* of the College, he took the opinion of counsel as to the propriety of making such transfer; when he was advised that, though the Provost and Fellows were, by the terms of the bequest, trustees only of the legacy, yet that, if they were trustees thereof by the tenor of the will, he could not properly make a transfer thereof to the Provost and Scholars, and that he would incur responsibility and risk by so doing; and he submitted that the legacy *was not specific*.

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Previously to the hearing of the cause, the following admissions were agreed to by the parties: First, that the name by which the College was incorporated, was "The Provost and Scholars of Queen's College in the University of *Oxford*:" Secondly, that all corporate acts by the Plaintiffs, were determined upon and performed by the Provost and *Fellows* of the College: Thirdly, that, in common parlance and popular language, the name of the Provost and Fellows was used instead of the Plaintiffs' name of incorporation: Fourthly, that the library of the College was held by the Plaintiffs, in their corporate capacity, for the use of the College: And, fifthly, that the library was principally composed of books given by many different benefactors, at different times, for the benefit of the College.

On the cause coming on to be heard,

Mr. *Walker* and Mr. *Simpson*, for the Defendant, objected that the Provost and Fellows of the College, ought to have been made parties to the bill in their individual capacities; as there was ground for contending that they were intended to be trustees of the legacy for the body corporate. *Attorney-general* v. *Sibthorp* (*a*); *Attorney-general* v. *Tancred* (*b*).

The VICE-CHANCELLOR:

As, in common parlance, the name of the Provost and Fellows is used instead of the proper corporate name of the College, and as the library is held by the body corporate, I think that that body was intended to take. For the legacy is to be expended in the purchase

(*a*) 2 Russ. & Myl. 107.
(*b*) Ibid. 111, note; and 1 Eden, 10; and Amb. 351.

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of books to be added to the library of the College; and no persons could add books to the library, unless they were the owners of the library. The objection, therefore, must be over-ruled.

Mr. *G. Richards* and Mr. *W. R. Williams*, for the Plaintiffs, contended that the legacy was specific; first, because the testator had directed it to be laid out within a certain specified time: and, secondly, because he had directed that if, at the time of his decease, he should not have a sufficiency of bank annuities *standing in his name* to answer the stock-legacies given by his will, his executor should purchase and make up the deficiency out of the residue of his real and personal estate. They said that the effect of that direction was to incorporate the words: "Standing in my name," with every bequest of stock contained in the will. They relied, principally, on *Fontaine* v. *Tyler* (*c*), where a bequest, in the following terms, was held to be specific: "If I shall not have so much as 10,000 *l.* capital stock in the three per cent. reduced or consolidated bank annuities, or one or both of them, I will that my executors hereinafter named, shall make up the capital sum of 10,000 *l.* in the reduced or consolidated bank annuities, or one or both of them, and shall hold the same upon trust for all and every children of my late niece *Frances*, who shall be living at my decease, equally to be divided between them." They cited also *Bethune* v. *Kennedy* (*d*), where the *Master of the Rolls* said: "The true test by which to try whether a bequest is or is not specific, is to inquire what would be the result if there had been pecuniary legacies with a deficient fund, or a necessity for a sale for payment of debts,—to

(*c*) 9 Price, 94. (*d*) 1 Myl. & Cr. 114; *see* 117.

inquire whether or not, in such a case, the bequest would have been protected in a competition with the claims of pecuniary legatees. A party claiming under a gift of all the property that a testator possessed of a specified kind, would not, I apprehend, be bound to contribute; and there is nothing in the particular expressions employed in the will under consideration, to make a difference in that respect. Upon the terms used in this will, therefore, which, it may be observed, are plainly distinguishable from those which occurred in *Alcock* v. *Sloper*, I am of opinion that this is a specific bequest of a sum invested in the long annuities, and to be enjoyed by the tenant for life in the state in which the testatrix left it."

Mr. *Walker* and Mr. *Simpson*, for the Defendant, said that, if the testator had had no stock standing in his name at his death, the Plaintiffs would have contended that the legacy was not specific but general: that the direction that the legacy should be expended within a specified time, did not make it specific: *Webster* v. *Hale* (*e*), where a bequest of 4,000 *l.* in the three per cent. stock, *to be paid as soon as possible*, was held not to be specific: that, in *Fontaine* v. *Tyler*, the words in which the legacy was given, invested it, *in the first instance*, with the character of a specific legacy; and it was on those words that the Lord Chief Baron held it to be specific: but, in the present case, the legacy was given generally; and all that the testator intended by the direction which had been so much relied on for the Plaintiffs, was to provide a fund for payment of that and his other stock-legacies; and that the providing of a fund for payment of a legacy, did not make it spe-

(*e*) 8 Ves. 410.

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cific, but was merely directory. *Mann* v. *Copland*(*f*); *Roberts* v. *Pocock*(*g*); *Smith* v. *Fitzgerald*(*h*).

The VICE-CHANCELLOR:

I am clearly of opinion that the legacy under consideration, is specific.

The testator gives, to the Provost and Fellows of Queen's College in the University of *Oxford*, the sum of 30,000*l.* three per cent. consolidated bank annuities, to be by them expended, within the space of three years next ensuing the date of his decease, in and for the purchase of such books for the use of and to be added to the library of the said College, as they, the said Provost and Fellows of the said College *for the time being*, shall, *in their discretion*, think fit. It is plain, therefore, that the testator intended that the Provost and Fellows *for the time being*, should exercise their discretion: and, consequently, they might say: "We are entitled to have the legacy as on the day of the testator's death;" for they could not exercise their discretion as to the books in which the fund was to be laid out, without having a fund to lay out.

Moreover, there is no substantial difference between this case and the case of *Fontaine* v. *Tyler*. There the testator directed that, if he should not have so much as 10,000*l.* capital stock in the three per cent. reduced or consolidated bank annuities, or one or both of them, his executors or the survivor of them, or the executors or administrators of such survivor, should make up the capital sum of 10,000*l.* in the reduced or consolidated

(*f*) 2 Madd. 223. (*g*) 4 Ves. 150.
(*h*) 3 Ves. & Beam. 2.

bank annuities, or one or both of them; and should hold the same upon trust for all and every children of his late niece *Frances*, late wife of *James Fontaine*, who should be living at his decease, equally to be divided between them. In the present case, the testator has directed that if, at the time of his decease, he should not have a sufficiency of bank annuities standing in his name to answer the several stock-legacies which he had before given, his executor should purchase and make up the deficiency out of the residue of his real and personal estate. So that he has taken in view and provided for the same circumstance as the testator in *Fontaine* v. *Tyler*, took in view and provided for; and that provision was the ground relied on, by the Lord Chief Baron, for holding the bequest in that case to be specific.

The only difference between that case and the present, is that, in the one, the direction to purchase the additional stock precedes the gift, and, in the other, it follows the gift. It is however of very little, if any, importance in what situation the words in a will stand: they must have their due effect given to them, in whatever part of the instrument they occur. If, in this will, the direction to purchase additional stock had stood before the gift of the legacy, then this case would have been the same in form (as, in my opinion, it is in substance) as the case of *Fontaine* v. *Tyler*.

On both grounds, therefore, I think that the Plaintiffs are entitled to the 30,000*l.* stock, and also to the dividends which have accrued on that sum since the testator's death.

1842:
15th March
and
30th May.
1843:
11th July.

FORBES *v.* PEACOCK.

Vendor and purchaser. Charge of debts. Receipt for purchase-money. Notice. Title.

THE demurrer put in in this cause having been overruled (see *ante*, Vol. XI. page 152), an order was made, on the 16th of December 1840, by which it was referred to the *Master* to inquire and state whether a good title could be made to the estate in question in the cause; and, in case the *Master* should find that a good title could be made, then he was to inquire and state when such title was first shown, and whether the Defendant or his solicitor ever and when made any and what objection to such title, or any and what requisition relating thereto: and, for the purposes aforesaid, the parties were to produce before the *Master*, upon oath, all deeds and writings in their custody or power relating thereto, *and to be examined on interrogatories* as the *Master* should direct: and the Court reserved the consideration of further directions and of the costs of the

Where a testator has charged his real estate with his debts, and the executor proceeds to sell the estate, the purchaser has a right to ask him, whether all the debts are paid or not, and, if he declines to answer, the purchaser will be considered to have had notice that all the debts have been paid, and will be answerable for the application of his purchase-money.

The question whether an executor or trustee who sells an estate, can give a good receipt for the purchase-money, is not a question of conveyance, but of title.

The decisions in *Bentham* v. *Wiltshire*, 4 Madd. 44; and *Page* v. *Adam*, 4 Beavan, 269, disapproved of.

Costs.—Practice.—Case sent to Law.

A Defendant, a purchaser, demurred to a bill for specific performance, and his demurrer was over-ruled. He then asked for a case to be sent to a Court of Law, which was granted; and the opinion of the Judges was against him. Ultimately, however, the bill was dismissed with costs. Held that the Defendant was entitled to his costs at law, as well as in equity.

suit until after the *Master* should have made his report.

The following objections to the title to the estate, were carried into the *Master*'s office on the Defendant's behalf:

First: because all the debts, funeral and testamentary expenses, and the pecuniary legacies given by the will of *John Fisher Throckmorton*, the testator in the cause, were fully paid shortly after his death, and no such debt or legacy was unpaid at the date of the agreement of the 28th of May 1840, and that there was a very large surplus of the testator's personal estate after payment of his debts and legacies; and that such surplus was, shortly after his death, invested, by *Elizabeth Throckmorton* and the Plaintiff, in the purchase of stock in the funds, and upon other securities; and that *Elizabeth Throckmorton* received the dividends and interest thereof down to the time of her death; and that the funds so purchased were then standing in the names of the said *Elizabeth Throckmorton* and the Plaintiff, or were otherwise in the power of the Plaintiff, as the surviving executor of the testator's will; and that the other securities were then vested in the Plaintiff or were then in his power as such surviving executor; and that, therefore, the Plaintiff had not any interest in the estate in question, or any power to sell the same, or to make a valid conveyance thereof to the Defendant.

Secondly: that the Plaintiff had not shown, and that, in fact, it was not known who was the heir at law of the testator, or, if known, such heir at law refused to join in the conveyance of the estate to the Defendant.

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Thirdly: that the Plaintiff had not shown, and that it was not known who were or was the parties or party entitled, under the will, to receive the purchase-money for the estate; or, if known, such parties or party refused to join in the conveyance of the estate to the Defendant, or to sign a receipt for such purchase-money.

On the 18th of March 1841, the following interrogatories for the examination of the Plaintiff in support of the Defendant's objections, were left with the *Master*:

First: Have not all the debts and funeral and testamentary expenses of *John Fisher Throckmorton*, the testator in the pleadings named, and all the legacies given by his will, been fully paid or satisfied? Were not the same fully paid or satisfied shortly after the testator's death, or when else? Were or was any and what debt or debts of the said testator owing or unpaid at the date of the agreement of the 28th day of May 1840, in the pleadings mentioned: if yea, to whom and for what, and were or was the same owing on any and what security or securities, and what is the date of every such security, and between and by whom made, and what are the short and material contents thereof, and where and in whose possession or power is the same now? or was any and what legacies or legacy given by the said will owing or unpaid at the date of the said agreement, and to whom, and by what right or title? Is it not the fact that no debt of the said testator, nor any legacy given by his will, is now owing or unpaid? Was there not a very large or some surplus of the personal estate of the said testator after payment of his debts and legacies? Was not such surplus, or some part or parts thereof, shortly after the death of the said

testator, or at some other time or times, invested by *Elizabeth Throckmorton* in the pleadings named, or the said complainant, or one of them, as the executors or executor or trustees or trustee of the said testator's will, or by their or one and which of their order, in the purchase of some shares or share of the public stocks or funds of this country, or upon some other securities or security? Did not the said *Elizabeth Throckmorton*, or some other person by her order or for her use, receive, for her own use, the dividends or interest, or some part or parts of the dividends or interest of such stocks, funds and securities or security, or of some and which of them, or some part or parts thereof respectively, or of some other and what part or parts of the personal estate of the said testator, or some payment or payments, and from whom, on account of such dividends or interest, down to the time of her death, or down to some other and what time, or at some time or times prior to her death? Are or is not some shares or share of the public stocks or funds of this country, now standing, or were or was not the same, lately or at some and what time or times and when last, standing in the names or name of the said *Elizabeth Throckmorton* and the said complainant, or one and which of them, or in the name of the said testator, in the books of the Governor and Company of the Bank of England: and are or is not the same or some of them, or some part or parts thereof, in some manner and how in the power of the said complainant, as the surviving executor or trustee of the testator's will: and are or is not, or were or was not, lately or at some time or times and when last, some other security or securities for money vested in the said complainant, or in some manner and how in his power as such surviving executor: and do or does not or did not the several stocks, funds and securities

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or security inquired after by this interrogatory, or some and which of them, or some and what part or parts thereof, form the clear surplus, or some part of the clear surplus of the said testator's personal estate?

2d. Who are or is the heirs or heir at law of the testator in the pleadings named; and where do or does such heirs or heir reside? Is it not the fact that it is not known who are or is such heirs or heir, or, if known, is it not the fact that such heirs or heir refuse or refuses to join in the conveyance of the estate in the pleadings mentioned to the Defendant? Have or has such heirs or heir consented to join in such conveyance, and how does it appear that such consent has been given?

3d. Who are or is the parties or party entitled, under the said testator's will, to receive the purchase-money for the said estate; and where do or does such parties or party reside? Is it not the fact that it is not known who are or is such parties or party, or, if known, is it not the fact that such parties or party refuse or refuses to join in the conveyance of the said estate to the said Defendant, or to sign a receipt for such purchase-money? Have or has such parties or party consented to join in such conveyance, and to sign such receipt; and how does it appear that such consent has been given?

The *Master* disallowed the interrogatories on the ground that the Defendant had no right to examine the Plaintiff as to the matters inquired after.

On the 4th of May 1841, the *Master* made his report in pursuance of the order before mentioned, and thereby found that, on the 29th of May 1840, an abstract of the

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title to the estate in question in the cause, was delivered to the Defendant, and that it had been laid before him, the *Master*, on the part of the Defendant, together with certain objections made, by the Defendant, to the title as shown by the abstract: that, on the part of the Plaintiff, there had been laid before him two statements containing answers to such objections, the one of such statements brought into his office on the 25th of February 1841, and the other, on the 3d of April following: that he had investigated the title appearing on the abstract, and was of opinion that a good title was thereby shown to the estate and premises; and, such title appearing on the face of the abstract when the same was delivered, he found that a good title was shown on the day on which the abstract was delivered: and, in pursuance of that part of the order which directed him to inquire whether the Defendant, or his solicitor, ever and when made any and what objections to such title, or any and what requisition relating thereto, the *Master* found that, on the 6th of June 1840, the Defendant applied, to the Plaintiff's solicitor, for a copy of the second of the schedules to a certain deed of conveyance, dated the 11th of May 1813, mentioned in the abstract, and stated that he wished to know who was the heir at law of one *John Fisher Throckmorton* in the abstract named, and whether *Robert Cooper*, the executor of the said *J. F. Throckmorton*, was dead, and if the parties entitled to the testator's residuary estate, were all of age: and the *Master* further found that, on or about the 24th of June 1840, the Defendant delivered, to the Plaintiff's solicitor, a copy of the opinion of *Richard Holmes Coote* esq., barrister at law, dated the 23d of June 1840, upon the title to the estate and premises; and that, on or about the 8th of October 1840, the Defendant's solicitor wrote a letter, to the Plaintiff's solicitor, requesting to be in-

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formed of the residences of the witnesses to *J. F. Throckmorton*'s will, *and to inquire whether there were any debts, due from the estate, which remained unsatisfied,* and, if not, whether the *cestuis que trust* had sent over any authority to sell, or had signified their approval of the steps that had been taken.

The Defendant took the following exceptions, which were intituled as exceptions to the *Master*'s report:

First, for that the Defendant carried in before the *Master*, under the before-mentioned order, interrogatories, founded upon the Defendant's state of facts and objections in the report mentioned, for the examination of the Plaintiff; which interrogatories the *Master* thought fit to disallow: whereas the *Master* ought to have allowed those interrogatories, and ought not to have made his report stating that a good title was shown to the estate in the pleadings mentioned, until the Plaintiff had put in his examination to the interrogatories.

Secondly, that the *Master* ought to have stated that a good title was not shown to the estate, for the reasons (amongst others) stated in the first, second and third objections to the title carried in on the part of the Defendant, and referred to in the report.

The exceptions now came on to be argued.

Mr. *Bethell* and Mr. *Bird*, in support of the first exception, said that the *Master* had received the Defendant's state of facts and objections to the title, in which it was stated that all the testator's debts had been paid, but had refused to allow that statement to be verified: that the Defendant had a right to have a case made for the opinion of a Court of Law upon the title;

that, in framing the case, it would be necessary to state under which of the two implied powers of sale the Plaintiff was acting; that, if the estate was sold for the purpose of paying the testator's debts, the Plaintiff alone could make a good conveyance and give a good discharge for the purchase-money; but, if the Plaintiff was selling the estate for the purpose, not of administration but of distribution, then the parties entitled to the proceeds of the sale, must join in the conveyance and in the receipt for the purchase-money; and, consequently, the purchaser had a right to know whether all the debts had been paid or not, especially as the testator died so long ago as the year 1815; and, therefore, the presumption was that all his debts had been long since satisfied. Moreover, that it was extremely doubtful whether the Plaintiff had a power to sell, except for payment of the testator's debts. *Bentham* v. *Wiltshire* (*a*).

The *Vice-Chancellor*:—This first exception appears to me to be irregular. It is an exception, not to the report, but to what the *Master* did previously to framing his report.

Mr. *G. Richards* and Mr. *James Parker*, in support of the report:

The Defendant ought to have applied, to the Court, for an order that the *Master* might be directed to receive the interrogatories. *Simmons* v. *Gutteridge* (*b*). We contend, however, that the *Master* was right in

(*a*) 4 Madd. 44.

(*b*) 13 Ves. 262. The following seems to be the course of proceeding with respect to interrogatories for the examination of a party in the *Master*'s office. The *Master* settles the interrogatories, and then certifies that he has done so. If either party thinks that the *Master* has allowed any inter-

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disallowing the interrogatories; for, under the words which are found in this will, the surviving executor had a power to sell, whether any of the testator's debts did or did not remain unpaid at the time of the sale; and, therefore, it was quite immaterial to inquire whether any of such debts remained unpaid or not. *Shaw* v. *Borrer* (*c*); *Tylden* v. *Hyde* (*d*); *Ball* v. *Harris* (*e*); *Eland* v. *Eland* (*f*); *Johnson* v. *Kennett* (*g*). In these two last cases it was decided that the rule of a purchaser being protected from seeing to the application of his purchase-money by a general charge of debts and legacies, had reference to the state of things at the death of the testator; and that, if the debts were afterwards paid, *that* could not vary the rule. In *Bentham* v. *Wiltshire*, the real and personal estates were not blended together, as they are in this case. [The *Vice-Chancellor*:—If Sir *John Leach* had seen the case of *Ward* v. *Devon* (*h*), which was decided by Sir *William Grant*, and of which I have a manuscript note, I do not think that he would have decided as he did in *Bentham* v. *Wiltshire*.] The question as to the materiality of the

rogatories which he ought to have rejected, or has disallowed any which he ought to have received, that party must except to the report. But, if the *Master* disallows interrogatories altogether, he does not certify his disallowance; so that, in that case, there is no certificate to be excepted to; and the party who carried in the interrogatories, must wait until the report is made, and then except to it, on the ground that the *Master* ought not to have rejected the interrogatories. *See* 2 Dan. Prac. 817–819.

(*c*) 1 Keen, 559.

(*d*) 2 Sim. & Stu. 238.

(*e*) *Ante*, Vol. VIII. p. 485; and 4 Myl. & Cr. 264.

(*f*) Ibid. 420.

(*g*) 3 Myl. & Keen, 624.

(*h*) Stated *ante*, Vol. XI. p. 160.

interrogatory now under consideration, and, also, of the two other interrogatories, was, in effect, decided, by your *Honor*, on the argument of the demurrer in this case. If, as your *Honor* states in your judgment, a purchaser of a real estate charged with debts, is not *bound* to inquire whether the debts have been paid or not, what *right* can he have to make the inquiry; more especially where he makes it, not for the purpose of supporting the title, but of destroying it? His right must depend upon his obligation; and, if he has no obligation to make the inquiry, he can have no right to do so.

The VICE-CHANCELLOR:

I cannot but think, that, as the matter stands upon the first exception, I must over-rule it.

My notion of the law is that, where, as in the present case, a testator has directed all his debts to be paid, and then appoints certain persons his executors and trustees, if, at any time after his death, those who have the power, sell any part of the testator's real estates, and nothing is said about the matter, the purchaser will have a good title; because, upon the face of the will, there is a charge of debts, and *non constat* that all the debts have been paid.

At the same time, I think that, if it should appear to be highly probable, at the time when the executors propose to sell, that the debts have been paid, a very important question may arise whether a good conveyance can be made by them alone, and whether the concurrence of the persons interested in the proceeds of the sale, may not be necessary. It strikes me, therefore, that where the objection is made, by the purchaser, that the executors cannot make a good title because all

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the debts have been paid, if the question is put by him simply—are there or are there not any debts remaining unpaid—he has a right to an answer.

But then the question is whether, as this first interrogatory is framed, I must not over-rule the exception that relates to it. That interrogatory is most minute. It asks, not only whether all the debts and funeral and testamentary expenses of the testator were not fully paid and satisfied prior to the date of the agreement for the sale of the estate, but also whether there was not a large surplus of the testator's personal estate after payment of his debts, and in what securities that surplus was invested, and whether the testator's widow did not receive the dividends and interest of those securities. Now, of what possible importance can it be to the Defendant to know all those minute circumstances, or to know anything more than whether any of the testator's debts remained unpaid? That was one of the interrogatories which the *Master* disallowed.

Then the Defendant has taken two exceptions, the first of which is thus expressed: "For that the Defendant carried in, before the said *Master* under the said order, interrogatories, founded upon the said Defendant's state of facts and objections in the said *Master's* report mentioned or referred to, for the examination of the Plaintiff, which interrogatories the said *Master* has thought fit to disallow: whereas the said *Master* ought to have *allowed* (not *settled*) the said interrogatories." Now, my opinion is that the interrogatory is wrong in point of form; for there was no reason why it should have been framed in this minute and extensive manner. Therefore, although I think that the Defendant had a right to know whether all the debts were paid or not

and that the *Master* ought to have allowed an interrogatory inquiring simply as to that fact, yet I do not think that he ought to have allowed an interrogatory inquiring into all the particulars which this first interrogatory extends to; and, consequently, I must over-rule the exception that relates to that interrogatory.

30th May.

On this day, an order was drawn up over-ruling the first exception, and directing a case to be made for the opinion of the Barons of the Exchequer upon the following questions:

First: whether the Plaintiff, under the testator's will, had power to sell the hereditaments in the pleadings mentioned, and convey the same to the Defendant in fee simple, in case the debts of the testator remained unpaid.

Secondly, whether the Plaintiff had such power in case it was uncertain whether any debts of the testator remained unpaid: and,

Thirdly, whether the Plaintiff had such power in case no debts of the testator remained unpaid. And it was also ordered that the further consideration of the second exception, and of the further directions and the costs of the suit, should stand over until the return of the Barons' certificate.

The case was argued in May 1843; and, on the 1st of June the Lord Chief Baron (Lord *Abinger*), Mr. Baron *Gurney* and Mr. Baron *Rolfe*, returned the following certificate: "We have heard this case argued by counsel and have considered the same, and we are of

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opinion that, whether there are or are not debts unpaid, and whether it is or is not uncertain whether any debts remain unpaid, the Plaintiff has a power to sell and convey the hereditaments, mentioned in the case, to the Defendant in fee simple."

1843: 11th July.

The cause now came on to be argued on the matter of the second exception, and on the equity reserved, and for further directions on the *Master*'s report, and as to costs.

Mr. *Bethell* and Mr. *Bird* said that, owing to the length of time which had elapsed since the testator's death, there was a strong presumption that all his debts were paid; that the Court had decided that the Defendant had a right to know whether any of the debts remained unpaid; and, as the Plaintiff had declined to give him any information on that subject, the Court would not compel the Defendant to complete his contract in the absence of the parties beneficially interested in the proceeds of the sale; for the circumstances of the case afforded intrinsic evidence that the executor was not selling the estate for the purpose of paying the charges on it created by the will; *Watkins* v. *Cheek* (*i*): that *Johnson* v. *Kennett* (*k*), as decided by his *Honor*, also bore strongly on the present case; and that the Lord Chancellor affirmed the *principle* of that decision; and reversed the decree only because he differed, from his *Honor*, in the conclusion which he drew from the facts of the case. *Wheate* v. *Hall* (*l*); *Mortlock* v. *Buller* (*m*).

(*i*) 2 Sim. & Stu. 199; *see* 205,

(*k*) *Ante*, Vol. VI. p. 384.

(*l*) 17 Ves. 80.

(*m*) 10 Ves. 292.

The *Vice-Chancellor*:—If it had been admitted, in *Johnson* v. *Kennett*, that there were any debts remaining unpaid, the bill ought to have been dismissed. The decree that was drawn up, is clearly wrong on the face of it (*n*).

Mr. *Cooper* and Mr. *James Parker*:

It is clearly established, by your *Honor*'s decision on the demurrer in this case, and by the opinion of the Barons of the Exchequer on the case sent to them, that the Plaintiff can make a good title to the estate agreed to be sold; and, consequently, he is now entitled to have the second exception over-ruled, and to have a decree for a specific performance. [The *Vice-Chancellor*:—I am of opinion that the certificate of the Barons of the Exchequer upon the case submitted to them, is right; but neither that case nor the bill stated that Mr. *Forbes* had been asked whether any of the testator's debts remained unpaid and that he had refused to answer. Therefore, I have now before me a very different question from that which was before the Barons of the Exchequer, or before me when the demurrer was argued. If a testator charges his real estate with payment of his debts, *that, primâ facie,* gives his executor power to sell the estate and to give a good discharge for the purchase-money: that was all that I decided on the argument of the demurrer. And all that the certificate of the Barons of the Exchequer decides, is that the executor has power to sell and convey the estate to the purchaser, whether any of the testator's debts remain unpaid or not. It is a very important question whether the executor has power to give a good receipt for the purchase-money; for, in my opinion, if

(*n*) *Ante*, Vol. VI. p. 390.

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he can not, he can not make a good title. That question was not, nor could it, with any propriety, have been submitted to the Court of Law; for it is purely a question of equity.] The Defendant had no right to inquire whether there were any debts in existence or not; for, in *Eland* v. *Eland*, Lord *Cottenham*, C., following the decision of Lord *Lyndhurst* in *Johnson* v. *Kennett*, held that the rule that a purchaser is protected from seeing to the application of his purchase-money by a general charge of debts and legacies, had reference to the state of things at the death of the testator; and that, if the debts were afterwards paid, leaving the legacies charged, that did not vary the rule. [The *Vice-Chancellor*:—If there is a general charge of debts and the purchaser makes no inquiry, he is exempted from the necessity of seeing to the application of his purchase-money. But here the purchaser has asked the executor whether any of the testator's debts were unpaid at the date of the contract, and the executor has refused to give him an answer. Under those circumstances, if it should turn out that all the debts were paid, I should hold that the purchaser had notice of that fact, and that he was bound to see that his purchase-money was properly applied. The mere abstract fact that all the debts were paid at the time of the purchase, is, indeed, immaterial; but, if the purchaser will ascertain that fact, then I should recommend him to see that he gets an effectual receipt for his purchase-money. The decisions in *Johnson* v. *Kennett* and *Eland* v. *Eland*, have no bearing on the question now before me. All that Lord *Lyndhurst* decided in *Johnson* v. *Kennett*, was that the transactions which had taken place between the vendor and the purchaser, in that case, did not amount to notice that all the debts had been paid. That was the point on which he differed from me and reversed the decree, which, as I be-

fore observed, was wrong on the face of it.] The decision in *Shaw* v. *Borrer* is founded on the same doctrine as was laid down in *Johnson* v. *Kennett* and *Eland* v. *Eland*; and the result is that, where the will contains a general charge of debts, it is wholly immaterial to the purchaser whether the debts have been paid or not; and, therefore, he has no right to make any inquiry, of the executor, on the subject.

Page v. *Adam* (*o*) is another, and a most decisive authority in our favour. There the answer admitted that all the testator's debts were paid at the date of the contract, and that the sale was not made for the purpose of paying the debts; and yet Lord *Langdale*, M. R., held that, as the will contained a general charge of debts, the purchaser was exonerated from any liability in respect of the application of his purchase-money. Therefore, it is wholly immaterial that the purchaser in the present case, has asked the executor whether all the debts were paid or not, and that the executor has refused to answer.

The *Vice-Chancellor*:—It certainly seems to me that Lord *Langdale* has expressly decided against my opinion; and, if the decision in *Page* v. *Adam*, is to be considered as the law of this Court, it does decide the question.

Mr. *James Parker*:

The power of sale in this case, does not at all depend upon the charge of debts. The testator has directed that, at the death of his wife, the residue of his estate should be collected, including the profits of the house and lot, if not previously sold, to be then disposed of

(*o*) 4 Beav. 269.

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and divided as he afterwards directs. So that he has blended the whole of his residuary property, both real and personal, into one common fund; and his executor has the same power with respect to his real estate, as he has with respect to his personal estate; that is (the widow being dead and the time of sale having arrived) he is enabled, independently of the charge of debts, to sell the real estate and to give an effectual discharge for the purchase-money. The case of *Tylden* v. *Hyde* was, substantially, the same as the present case, except that there was no charge of debts; and Sir *John Leach* held that the executors could make a good title to the estates agreed to be sold, and could, by themselves, without the concurrence of the *cestuis que trust*, effectually convey the estates to the purchasers. So, in *Ward* v. *Devon*, there was no charge of debts; and yet it was held that the executors could make a good title. [The *Vice-Chancellor*:—I do not think that the question, whether the executors could give a good discharge for the purchase-money, arose in that case. The question was, whether they had a power of sale.] The question was, whether they could make a good title; and, as it was held that they could, they must have had power to give a discharge for the purchase-money. Here, the time of sale has arrived, and it is the duty of the executor to sell (whether there are debts or not), in order to blend the proceeds of the sale with the residuary personal estate; therefore, we submit that, the executor can give a valid discharge for the purchase-money, without the concurrence of the *cestuis que trust*.

The VICE-CHANCELLOR:

I should be very glad that my opinion should be reversed. The only question is what has been understood to be the rule of this Court for more than a cen-

tury. I have long been of opinion that the rule is a most inconvenient one.

Until the decision in *Page* v. *Adam*, it never had been held that, where there was a charge for payment of debts and where the purchaser knew that the debts were paid, he was exempt from seeing to the application of his purchase-money (that is) in a case where there was a trust for sale and an obligation to pay the proceeds to *A.* and *B.* I admit that cases where the payments have been directed to be made in such a manner that it was quite impossible, at the time, that all the parties interested could release, have been exempted from the operation of the rule.

But the case before me is this: the testator has, by words (I agree with Mr. *Parker*) given an authority to the executor, has given him a power to sell, with a direction that he shall sell, and that the proceeds are to be divided as follows: Then he says that his sister has four children, and his deceased brother has left three, perhaps four children; "but, to them, be they seven or be they eight, I give, &c." So that there are only seven or eight persons named as participants, and no difficulty is represented as to them.

It seems to me that what Lord *Lyndhurst* says in *Johnson* v. *Kennett*, does not apply to the present case. Lord *Lyndhurst* there states general propositions, to the truth of which I willingly subscribe, as I do to those propositions mentioned by Lord *Cottenham* in his decision in the appeal case of *Eland* v. *Eland*. The observation I have to make on that case, is that, before his Lordship comes to lay down the law, in speaking of the case of *Johnson* v. *Kennett* (which always appeared to

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me to be a mere series of blunders, that is to say, a certain case was stated at the bar on which an opinion was given, and then the decree was drawn up in direct contravention of the facts, because the decree directs an account of the debts)—His Lordship says, in page 428 of the report: "The *Vice-Chancellor* considered the case the same as if nothing but legacies had been originally charged." That was my construction on the particular facts. Lord *Lyndhurst* was against me on the construction of those particular facts. Then Lord *Cottenham* goes on to make this observation: "If that doctrine had been supported, it would have gone far to destroy the rule altogether: because, before it can come to that, the mortgagee must (and, if he is to be liable, he must in every case) go into an investigation of the fact of how far the debts have been discharged." I never did say so, nor does it appear to me to follow as a consequence. All that I said was that, if he knew the fact that the debts had been paid, then he could not be protected by the fact that the debts were charged, generally on the estate. But, to the general proposition which Lord *Cottenham* states, I subscribe.

Now what is the general principle? The Court has drawn a distinction from an early time. It has said that, if there is a mere direction to sell and to divide the proceeds, the purchaser of the estate must see to the application of the purchase-money, and the parties amongst whom the proceeds are to be divided, must give receipts to the purchaser; but, in a case where a testator charges his estate with debts and directs that there shall be a sale, either by an express trust or by a general power, the Court says it is quite impossible for the purchaser to ascertain who are the creditors of the testator, and to see that they are paid; and, if he is not

bound to look to the persons whose claims are first to be satisfied, of course he is exempted from looking to the claims of the persons who take as *cestuis que trust*. That is the principle of the rule: and, that being the principle of the rule, I am yet to learn how that principle does not apply to a case where the purchaser is, in effect, informed that the debts have been paid; and I consider that what is stated to have taken place, in this case, between the vendor and the purchaser, does amount to that.

Now no case has been produced in which it has been decided that the purchaser, knowing that the debts have been paid, is exempt from the necessity of seeing to the application of the purchase-money, except this case of *Page* v. *Adam*. I have the greatest possible respect for my Lord *Langdale*'s opinion; and feeling, as I do, that the principle which this Court has adopted is a most inconvenient one and operates very much to the discomfort of parties in various family matters, my own personal wish is that the law should be altered: but I do not imagine I am at liberty to think that the law is made so clear by this single decision in *Page* v. *Adam*, that I am justified in saying that this purchaser has got a good title. [Mr. *Bethell*:—In *Page* v. *Adam*, the debts were not all paid at the time of the sale.] I observed that: but it does not appear to me to make a substantial difference. My notion is that the law upon the point must, at least, be considered as unsettled; and my own personal opinion as a Judge, is that the decision in *Page* v. *Adam*, is contrary to the current of authority; and I am bound by my duty as a Judge, to say, to the purchaser, that, in my opinion, if he takes this title, he will take a bad title.

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Lastly, it was said that this is a matter of conveyance only: but I do not think so, and for this reason; because, in order to convey and make a good title, the person to convey must not only have the power of conveying the legal estate, but have, in himself or in others over whom he has dominion, the power of conveying all the equitable interest as well. If a person has the whole equitable estate in himself, and there is a trustee who has got the legal estate in him, if the question were whether he who has got the equitable estate, has a good title, you would say, in common language, that he can make a good title; because he can convey the whole beneficial interest, and has a power of compelling a conveyance of the legal estate. In this case, Mr. *Forbes*, the executor and trustee, has a power to convey the legal estate; but he cannot, by any act of his own, give the intended purchaser an effectual receipt for the purchase-money, that is to say, he cannot convey the equity to the purchaser. He may convey the legal estate; but he has no dominion over the devisees of the money, so as to compel them to give the equitable interest in the estate: and, therefore, it appears to me not to be a matter of conveyance merely, but a matter of title. And, as my opinion is that the law has not yet gone so far as to authorize the decision in *Page* v. *Adam*, the bill must be dismissed. At the same time I am most desirous that my opinion should be canvassed before higher authority, and be reversed.

At the conclusion of the judgment, Mr. *Cooper* said that, if the bill was to be dismissed, it ought to be dismissed without costs; or, at all events, the Defendant ought not to have his costs at law; as he had asked for

the case after the decision on the demurrer; and the opinion of the Barons, like the decision on the demurrer, was against him.

The *Vice-Chancellor* said that neither party was wrong in asking for the opinion of a Court of Law upon a mere question of law; and that the costs of the case, were part of the costs of the cause, incurred with a view to the final termination of the suit.

The order, as drawn up, stated that the Court held the second exception to be sufficient, and did allow the same; and ordered that the deposit made with the Registrar on filing the exceptions, should be paid to the Plaintiff and Defendant in equal moieties: and, with respect to the further directions, that the bill should be dismissed with costs (including the Defendant's costs at law), to be taxed by the *Master* and paid by the Plaintiff*.

* An appeal from this order is pending before the *Lord Chancellor*.

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16th and 19th March.

SCOTT *v.* PASCALL;

PASCALL *v.* SCOTT.

Practice. Depositions. Cross-cause.

After publication in the original cause, the Plaintiffs in the cross-cause, without the leave of the Court, examined witnesses in their cause, some of whom had been examined in the original cause, and as to matters, some of which were in issue in the original cause. The Court, on the application of one of Defendants to the cross-suit, ordered the depositions to be suppressed.

THE bill in *Scott* v. *Pascall* was filed to set aside a deed, on the ground that it had been executed under duress. The object of the bill in *Pascall* v. *Scott* was to support the deed; so that the former was an original and the latter a cross-cause, and the same matters were in issue in both: the cross-cause, however, was not *confined* to those matters.

The Plaintiffs in the cross-cause did not examine any witnesses in chief in the original suit; but, after publication had passed in that suit, and, notwithstanding their solicitor had been served with a notice, on behalf of *Elizabeth Scott*, the Plaintiff in the original and one of the Defendants in the cross-cause, stating that she should object to their going into evidence in their suit as to any of the matters in issue in her suit, after publication should have passed in the latter, they, without the leave of the Court, proceeded to examine in chief in their own cause, witnesses, some of whom had been examined in chief in the original cause, and as to matters, some of which, at least, were in issue in the original cause.

A motion in the cross-suit, was now made on behalf of *Elizabeth Scott*, that the depositions of the persons named in the notice of motion, to the interrogatories, exhibited by the Plaintiffs in the cross-cause, which the notice specified, might be suppressed.

An affidavit was made in opposition to the motion, stating that, when the Plaintiffs in the cross-cause examined their witnesses, they had not seen the depositions in the original cause.

Mr. *Stuart* and Mr. *Parry*, in support of the motion, cited *Wilford* v. *Beaseley* (*a*); *Ridley* v. *Obee* (*b*); *Conethard* v. *Hasted* (*c*); *Ward* v. *Eyles* (*d*); *Sawyer* v. *Bowyer* (*e*); and *Purcell* v. *Macnamara* (*f*). They added that though the two last cases related to the examination of a witness by the *Master*, the principle on which they were decided, was applicable to the present case; and that *Sawyer* v. *Bowyer* showed that the proper order to be made was that the depositions, which had been irregularly taken, should be suppressed.

Mr. *Teed* and Mr. *Rogers*, for the Plaintiffs in the cross-suit, cited Pract. Reg., page 87, and *Norcliff* v. *Worsley* (*g*), and said that the cases cited by the other side, were distinguishable from the present case: that, in *Wilford* v. *Beaseley* the depositions in the cross-cause, were taken after the decree had been made in the original cause, and that the object of the cross-suit was to reverse that decree; and, besides, the purport of the depositions in the original suit, must have been known to the Plaintiff in the cross-suit: that, in *Ridley* v. *Obee*, the Plaintiffs in the cross-cause, asked that their cause might be heard at the same time as the original cause; which the Plaintiffs in *Pascall* v. *Scott* did not: that, in *Conethard* v. *Hasted*, there was only an original cause, and the depositions which the Defendant sought

(*a*) 3 Atk. 501.
(*b*) 3 Price, 26.
(*c*) 3 Madd. 429.
(*d*) Mos. 377.
(*e*) 1 Bro. 388.
(*f*) 17 Ves. 434.
(*g*) 1 Ca. in Ch. 234.

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to have read at the hearing of the cause, had been taken under an order which was clearly irregular; for it had been obtained, *as of course*, after publication passed; and that *Sawyer* v. *Bowyer* and *Purcell* v. *Macnamara* showed only that it was irregular for the *Master*, after decree, to examine a witness to the same matter as the witness had been examined to in chief. They added that there were other Defendants to the cross-cause besides *Elizabeth Scott*, but that they did not join in the application; and that the cross-cause and the depositions in it which were sought to be suppressed, embraced matters which were not in issue in the original suit, and in respect of which the Plaintiffs sought relief against the other Defendants, and not against *Elizabeth Scott*.

The VICE-CHANCELLOR:

It is reasonably plain that I ought to make the order which is asked by the notice of motion.

The case of *Sawyer* v. *Bowyer* was the same in principle, though not in form, as the present; and the Lord Chancellor, Lord *Thurlow*, ordered the depositions to be suppressed.

In a case which was before me a short time since(*h*), where a supplemental bill (which was, in effect, a bill of review, as it sought to alter the frame of the original decree) had been put on the files of the Court without the leave of the Court, I thought it right to order it to be taken off the file. So, in cases where permission has been given to amend a bill by stating certain matters, and the Plaintiff has stated in it matters which he was not justified in stating by the permission given, the Court has ordered the bill to be taken off the file.

(*h*) See *Hodson* v. *Ball*, *ante*, Vol. XI. p. 456.

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Here, though there has been no actual, dishonest dealing, yet the course of the Court is to guard against perjury with a vigilant eye. It was improper to examine witnesses in the cross-cause, after publication passed in the original cause; and therefore I shall order the depositions referred to in the notice of motion to be suppressed.—Order made with costs, as prayed by the notice of motion (*i*).

Reg. Lib. B. 1841, fo. 540 b.

(*i*) Affirmed by The *Lord Chancellor*, 1 Phill. 110.

RAND *v.* MACMAHON.

1842: 16th March and 26th May.

Will. Establishing will. Practice.

THIS was a suit to establish the will of *Samuel Long*, Esq. late of the Island of *St. Christopher* in the *West Indies*, and to have the trusts of it performed under the direction of the Court.

The will was dated on the 6th of February 1823, and the testator died on the 9th of that month. His will was proved in *St. Christopher's*; and, afterwards, a duly

A will was proved in the *West Indies*, and a duly authenticated copy of it was sent to this country, accompanied by an affidavit, made by one of the attesting witnesses when the will was proved, showing that the will had been executed and attested pursuant to the Statute of Frauds; and that copy was admitted to probate in this country, and was produced in the Court of Chancery, with the affidavit annexed to it.

The *Vice-Chancellor*, however, refused to establish the will, without full proof of its due execution and attestation.

The Court of Chancery will establish a will made and proved in the Colonies, on the production of a duly authenticated copy of it, provided the due execution and attestation of the original are proved by the attesting witnesses.

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authenticated copy of it was proved in the Prerogative Court of the Archbishop of Canterbury.

At the hearing of the cause, the copy of the will was produced in Court, together with an affidavit, made by one of the attesting witnesses on the will being proved in *St. Christopher's*, the effect of which was that the will had been signed, published and attested in the manner required by the Statute of Frauds*; and, upon that evidence,

Mr. *G. Richards* and Mr. *Hislop Clarke*, for the Plaintiff, asked the Court to establish the will. They referred to *Pullan* v. *Rawlins* (*a*), and to the notes of cases which are subjoined to the report of that case.

The *Vice-Chancellor* said that, in *Pullan* v. *Rawlins*, the testator died in **1795**, and, consequently, his will proved itself; but, in the present case the testator died so recently as **1823**: and his *Honor* ordered the cause to stand over in order that the matter under consideration, might be more fully investigated.

26th May.

The cause having come on again on this day,

Mr. *Richards* and Mr. *H. Clarke* produced an office copy of the following decree, dated 26th April 1841, made by the *Master of the Rolls* in

Ellis and Another v. *Maxwell and others.*

"This cause coming on the 21st day of April instant to be heard and debated before the Right Honourable

* The Statute of Frauds was in force in the Island of *St. Christopher.*

(*a*) 4 Beavan, 142.

the *Master of the Rolls*, in the presence of counsel learned on both sides: Upon debate of the matter, and hearing an official probate copy of the will of *William Maxwell*, the testator in the pleadings named, and the codicil thereto under the official seal of his Grace the Archbishop of *Armagh*, and signed by *John Hawkins*, deputy registrar of the Court Prerogative of *Ireland*, and *the proofs taken in this cause* and the Defendants' answers read, and what was alleged by the counsel on both sides: his Lordship did order that this cause should stand for judgment: and this cause standing this present day for judgment in his Lordship's paper of causes, in the presence of counsel on both sides, his Lordship doth declare that the will of *William Maxwell* the testator is well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution, &c."

[Reg. Lib. A. 1840, fol. 888.

The Registrar's book also, containing the entry of the decree in *Bayly* v. *Bayly*, was produced in Court: and it then appeared that the testator in that cause died on the 26th of October 1798; and that, on the cause coming on to be heard, the *Lord Chancellor* ordered it to stand over, in order that the *testator's will*, dated the 17th of October 1798, *might be proved.*

The cause was again brought on for hearing; and then, upon debate of the matter and hearing the transcript of the will under the seal of the Island of *Jamaica*, proved in the Prerogative Court of the Archbishop of Canterbury by *Job Matthew Raikes*, one of the executors in *England, and the proofs taken in the cause*, read and what was alleged by the counsel on both sides: his Lordship declared the will well proved, and that the

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same ought to be established, and did order and decree the same accordingly.

[Reg. Lib. A. 1801, fol. 994.

In *Harrison* v. *Weale*, it was referred to the *Master*, at the hearing of the cause, to inquire and state who was the heir at law of the testator, *W. G. Harrison* (who died on the 14th of November 1825); and, if the *Master* should find there was no such heir, the Plaintiff was to be at liberty *to exhibit interrogatories, in the Examiner's office, for the examination of witnesses to prove the due execution of the testator's will; and, for that purpose, the Plaintiff was also to be at liberty to sue out a commission for the examination of witnesses in Jamaica.* The *Master* reported that there was no heir at law of the testator: the cause then came on to be heard for further directions, and, upon hearing the official transcript of the will, which had been proved in the Prerogative Court of the Archbishop of *Canterbury* by the executor in *England, and the proofs taken in the cause, read,* the Court declared the will well proved, and that it ought to be established.

Reg. Lib. A. 1839, fol. 1459.

The *Vice-Chancellor* said that, in *Bayly* v. *Bayly*, evidence was entered into, and, for any thing that appeared to the contrary, the will might have been proved: that that case showed, merely, that this Court would allow a certified transcript of the will to be produced instead of the original: that, in the present case, one only of the attesting witnesses went before the Registrar of the Court in *St. Christopher's* and proved the will; and that if what had been done in *St. Christopher's* had been done here, the Court could not have established the will.

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Mr. *Richards* then said that, as the Court thought that the will could not be established, he must ask for a commission to examine the witnesses to it in *St. Christopher's*.

The other counsel in the cause, were Mr. *Stuart*, Mr. *Girdlestone*, Mr. *L. Wigram* and Mr. *Bagshawe*.

ROGERS *v.* GRAZEBROOKE.

1842: 24th March.

Payment of money into Court. Defendant.

A. and *B.* insured, in their joint names, certain leasehold premises which *A.* had mortgaged to *B.*, and *B.* paid the premium on the insurance, and the policy was delivered to him. Afterwards the premises were destroyed by fire; and then *A.* became bankrupt, and his assignees prevailed on the insurance company to pay the money due on the policy to them; and they afterwards paid it into the Bank to the credit of the accountant in bankruptcy. *B.* filed a bill against the assignees, praying that the money received from the company might be applied in satisfaction of his mortgage-debt. The answer of the assignees tended to impeach the mortgage on the ground of usury. The Court, however, ordered them to pay the amount of the money into Court.

THE Plaintiff was a bill-broker: the Defendants, *Grazebrooke* and *Drew*, were the creditors' assignees, and the other Defendant, *Alsager*, was the official assignee of *Reuben Hunt*, a bankrupt. The case made by the bill was shortly as follows. In October 1839, the Plaintiff having in his hands two bills of exchange drawn by *Hunt*, one for 500 *l.* and the other for 150 *l.*, and *Hunt*, being desirous of obtaining further advances of money from the Plaintiff, deposited with the Plaintiff a lease and assignment of certain hereditaments, fixtures, implements and utensils, as a security, by way of equitable mortgage, for all sums of money which he might thereafter owe to the Plaintiff, and lawful interest thereon. The Plaintiff afterwards (from time to time)

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made advances to *Hunt*; so that, on the 4th of June 1840, *Hunt*, as well upon the bills of exchange (which were dishonoured) as in respect of such advances, was indebted to the Plaintiff in 3,000 *l.* and upwards: in consequence of which the Plaintiff became desirous of obtaining a legal mortgage of the hereditaments and premises; and, accordingly, by an indenture dated the 4th of June 1840, *Hunt* assigned to him the hereditaments, and also the steam-engine, boiler, pipes, valves, pumps, cocks, lathes, fixtures, tools and implements used by him in his business of a millwright, and all the fixtures, goods, chattels and effects then being in and about the hereditaments and which were specified in the schedule thereto, subject to a proviso for redemption, on payment by *Hunt* to the Plaintiff, of 1,000 *l.* and interest at the rate of five per cent. per annum. On the same day *Hunt* and the Paintiff insured the mortgaged premises for 2,000*l.* in the Phœnix Insurance Office, in their joint names, the Plaintiff being described, in the policy, as the mortgagee, and *Hunt* as the mortgagor; and the premium on the insurance was paid by the Plaintiff, and the policy was delivered to him. Shortly afterwards the mortgaged premises were destroyed by fire. In August 1840 *Hunt* became bankrupt: and the Plaintiff and *Hunt*'s assignees severally claimed the 2,000 *l.* from the insurance company. The claim was, at first, resisted by the company, but, ultimately, the assignees made a compromise with them, and agreed to accept 1,100 *l.* in full discharge of their liability; and that sum was accordingly paid to the assignees, and they gave, to the company, a release in full, and also an indemnity against any claim which should be made by the Plaintiff. The Plaintiff applied to the assignees to discharge what was due to him on his mortgage out of the 1,100*l.*, but they refused so to do.

The bill prayed for a declaration that the 1,100*l.* was applicable, in the first instance, to the satisfaction of what was due, to the Plaintiff, on his mortgage, and for an account of what was so due; and that the Defendants might be ordered to pay the amount to the Plaintiff, he offering, upon such payment being made, to assign the mortgaged premises to the Defendants.

The Defendants, in their answer, said that they had no personal knowledge of the transactions mentioned in the bill, or of the transactions between the Plaintiff and the bankrupt, nor any information relating thereto, except as thereinafter appeared; but that, in June 1841, the Plaintiff alleged that the bankrupt was indebted to him in the principal sum of 3,091*l.* 2*s.* 9*d.*, upon an account which he annexed to an affidavit, and that such sum was due to him upon mortgage of the premises mentioned in the bill, and that he applied to the Commissioner of Bankrupts acting under the fiat, for a sale of those premises: that, in consequence of such application, the Defendants inquired into the nature of the dealings and transactions of the Plaintiff and the bankrupt, and caused the Plaintiff and his attorney and the bankrupt and other persons to be examined before the Commissioner, touching such dealings and transactions, and, by such examinations and otherwise, and especially by the admissions of the Plaintiff upon such examinations, they discovered (as the fact was) that the debt claimed by the Plaintiff to be due to him from the bankrupt and his alleged mortgage security, were founded in usury and upon a usurious contract, and that the mortgage security was void under the usury laws; and the Commissioner of Bankrupts so decided, and refused to admit the Plaintiff to prove any debt under the fiat:

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that, from such examinations, it appeared, and the Defendants believed the fact to be and doubted not to prove that all the dealings and transactions between the Plaintiff and the bankrupt, in respect of which the Plaintiff claimed to be a creditor of the bankrupt and entitled to the mortgage and to the policy of insurance or the money paid thereunder, took place after he had the security of the equitable mortgage and the other securities mentioned in the bill, and consisted of advances of money upon bills of exchange, or the discount of bills of exchange, upon an agreement to be allowed, by the bankrupt, upon such advances or discount, interest at 10 per cent. for three months, or at 40 per cent. per annum, and that the Plaintiff was allowed by the bankrupt to retain such interest accordingly: that the Plaintiff, after the bankruptcy and before he made the beforementioned application to the Commissioner, prevailed on the bankrupt to destroy many of his books which contained entries relating to such dealings and transactions, and from which the true nature of them would appear, and also some of his documents and vouchers, and to fabricate others which would support the case which the Plaintiff desired to present to the Commissioner, and, in particular, that the Plaintiff, before the bankruptcy, rendered to the bankrupt some account in which the interest charged and retained by him appeared, but, after the bankruptcy, he delivered, to the official assignee, an account, either omitting such charges, or inserting them as monies lent or advanced to the bankrupt: that, in the account so rendered to the bankrupt himself, was charged a sum of 60*l.* on the 31st of May 1840, as for interest or discount; and that, in the account delivered to the official assignee, the same sum was charged as money lent: that, among the vouchers, was an I O U for the 60*l.*, by which it appeared that

the same was given for interest; that the Plaintiff's attorney, having seen such voucher, destroyed it with the Plaintiff's privity, and procured another to be given by the bankrupt and produced it, to the official assignee or the Commissioner, in support of the Plaintiff's claim; and that he did so because the production of the one destroyed, would have shown that the Plaintiff's securities were tainted with usury: that the Defendants believed that the Plaintiff, after he had received the security mentioned in the bill, did become the indorsee and holder of the two bills of exchange, and discounted the same upon being allowed 125*l.* 6*s.* 8*d.* for the discounting the bill for 500*l.*, and 35*l.* for discounting the bill for 150*l.*, such discount far exceeding interest at the rate of five per cent.: that they believed that both the bills were afterwards paid or renewed, and that neither of them formed any part of the account in respect of which the Plaintiff claimed to be a mortgage creditor of the bankrupt: that they believed that, after the bankrupt had made the equitable mortgage to the Plaintiff, the latter did, from time to time, make advances of money to the bankrupt upon bills of exchange or by discounting bills of exchange, and that no sums were lent or advanced by the Plaintiff to the bankrupt, nor was any bill of exchange discounted for him except on the terms of the Plaintiff being allowed interest at the rate of 10 per cent. for three months, or some such rate, and more than five per cent. per annum: that they believed that the assignment by way of mortgage was made without any sufficient valuable consideration, and that the 1,000*l.* therein mentioned was not in fact due from the bankrupt to the Plaintiff, and that the mortgage was made by the bankrupt as a continuation of the usurious transaction before mentioned, and to be a security for what was or should be due to the Plaintiff

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in respect thereof: that they believed that the bankrupt and the Plaintiff did effect an insurance, with the Phœnix Insurance Office, on the leasehold premises and the chattels thereon, for 2,000 *l.*, namely, 250 *l.* on the buildings, 750 *l.* on the machinery and fixtures, and 1,000 *l.* on patterns in the millwright's shop; but which patterns were not included in the mortgage; and that the insurance was made in the joint names of the Plaintiff and the bankrupt, as mortgagee and mortgagor, and that the premium was paid by the Plaintiff, and the policy delivered to him: that the leasehold premises and the articles therein were destroyed by fire, as mentioned in the bill: that the Defendants, the creditors' assignees, having become aware of the usurious nature of the securities under which the Plaintiff claimed an interest in the property destroyed by fire, applied to the insurance company to pay to them the amount of the loss, and that the company, after some resistance, paid them 1,090 *l.*, upon receiving a discharge in full and being indemnified against any claim to be made by the Plaintiff: that 250 *l.* of the 1,090 *l.* was paid in respect of the value of the buildings, 340 *l.* in respect of the value of the chattels mentioned in the schedule to the mortgage-deed, and 500 *l.* in respect of the patterns: that *David Cannon* was originally appointed the official assignee under the bankruptcy, but that he had since died, and the Defendant *Alsager* had been appointed in his place; and that *Cannon*, before his death, *duly paid over or accounted for the money received from the insurance office: and the Defendants submitted to the judgment of the Court whether such money was still in their sole possession or power, or whether the same was not subject to the orders of the Court of Bankruptcy or of the Commissioner acting in execution of the fiat.*

Mr. *Bethell* and Mr. *W. M. James*, for the Plaintiff, now moved that the Defendants *Grazebrooke* and *Drew* might be ordered to pay the money which they had received from the insurance office, into Court. They said that the policy having been effected in the joint names of the mortgagor and mortgagee, they were jointly interested in the proceeds of it; and that the Court would not allow one joint-owner of property, or those who claimed under him, to hold or deal with the property against the will of the other joint-owner: that the money in question was the subject in dispute between the litigating parties, and that it ought to be preserved, by the Court, for the party who might be eventually declared to be entitled to it.

Mr. *Teed* and Mr. *Prior*, for the Defendants, said that the answer did not admit the Plaintiff's title to the money in dispute, but impeached it on the ground of usury: that the question whether the transactions which had taken place between the Plaintiff and the bankrupt, and in respect of which the insured premises had been mortgaged to the Plaintiff, could not be decided until the hearing of the cause, and that, in the mean time, the Court would not order the Defendants to pay the money into Court, especially as it had been paid into the Bank of England to the credit of the accountant in bankruptcy*, where it was as secure as it would be if paid into the Court of Chancery.

* *See* 5 & 6 Will. 4, c. 29, ss. 3 & 4. By 1 & 2 Will. 4, c. 56, s. 22, the whole of a bankrupt's property is directed to be possessed and received by the official assignee alone; and by a General Order made in pursuance of 5 & 6 Will. 4, c. 29, s. 4, the official assignee is to pay into the Bank, to the credit of the accountant in bankruptcy, all monies from time to time received by him, when they shall amount to 100*l.*

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ROGERS v. GRAZEBROOKE.

The VICE-CHANCELLOR:

The question here is whether the case is so clear against the Plaintiff, that I ought not to order the money in question to be paid into Court.

The circumstances stated in the answer, upon which the Defendants resist the Plaintiff's claim, are stated in a very general manner; so that I can not decide the point upon the answer: and I can not but think that it may turn out, consistently with the answer, that the Plaintiff is entitled, to some extent at the least, to the relief which he asks by his bill. The relation which subsisted between the Plaintiff and the bankrupt, was that of mortgagee and mortgagor; and, in those characters, they effected a policy of insurance on the mortgaged premises in their joint names. The premises were then destroyed by fire; and the money due on the policy was received by the Defendants in their character of assignees of the mortgagor, who, shortly before, had become bankrupt: and it appears, from their answer, that they have treated and disposed of the money as wholly belonging to the estate of the bankrupt. It is however quite new to me that, in respect of a joint security, one of the parties may receive the whole of the money payable upon it, and apply it to purposes irrespective of the claims of the other party. There is no reason why the assignees of a bankrupt should not be subject to the operation of the law of this Court, in the same way as other persons are: and, if they have received money which they ought not to have received, it is no answer to the owner that they, as assignees, have disposed of it in a particular manner. If they have received the money under such circumstances that it ought to be secured in Court, it follows, as a necessary consequence, that they are answerable for it, notwithstand-

ing what they have done with it, and, therefore, must pay the amount into Court.

Order the Defendants *Grazebrooke* and *Drew* to pay the 1,090*l.* received from the insurance company into Court.

The Defendants moved the *Lord Chancellor* to discharge the above order. His Lordship said that he was not concluded by the decision of the Commissioner under the fiat, that the transactions in respect of which the mortgage was executed, were tainted with usury, nor could he come to the same conclusion from the statements in the answer, so far, at least, as the bills of exchange for 500*l.* and 150*l.* were concerned: but, as the patterns appeared not to have been included in the Plaintiff's security, the sum which the Defendants had received, from the insurance company, in respect of those articles, ought not to have been ordered to be paid into Court; and that the *Vice-Chancellor*'s order must be varied accordingly.

1842: 22d April.

ABRAHAM v. NEWCOMBE.

Consent. Feme-coverte. Practice.

The Court will not take the consent of a married woman who is under age, to the payment of money to which she is entitled, to her husband.

IN this case, the *Vice-Chancellor* held that the consent of a married woman, who was under age, to the payment out of Court, to her husband, of a sum of money to which she was entitled, could not be taken.

The point was submitted to his *Honor* by Mr. *Kinglake*, who referred to the conflicting authorities of *Gullin* v. *Gullin* (*a*) and *Stubbs* v. *Sargon* (*b*).

(*a*) *Ante*, Vol. VII. p. 236. (*b*) 2 Beav. 496.

Gullin v. *Gullin*, *ante*, Vol. VII. p. 236, over-ruled.

1842: 22d April.

SOUTH v. WILLIAMS.

Will. Construction. Release of debts.

Testator bequeathed his residuary estate in trust for his son and daughter equally, and declared that certain sums which he had lent to his son, should be deducted from his share of the residue, and that certain sums which he had lent to *C. W.*, his daughter's husband, on bonds, *should be taken and allowed in account as part of her share; and, if the balance should appear to be against C. W., the trustees were to refrain from putting the bonds in force against him*, and to take a security from him for payment of the balance by instalments. The daughter died in the testator's lifetime. Held, nevertheless, that C. *W.* was released from the debts due from him, and was answerable only for the excess (if any) of those debts beyond the amount of a moiety of the residue.

J. BREACH, by his will dated the 31st of January 1835, gave the residue of his personal estate, after payment of his debts, funeral and testamentary expenses and legacies, to *Thomas South* and *Thomas Robson*, the

trustees and executors of his will, in trust for his son *Philip James Breach*, and his daughter *Susan Elizabeth*, the wife of *Charles Williams*, equally, as tenants in common; but subject, as to the respective shares of his said son and daughter, to the declaration thereinafter contained. The testator then expressed himself as follows: "And whereas, on the dissolution of partnership between my son *P. J. Breach* and my son-in-law, *Charles Williams*, I advanced, to my said son, the sum of 500*l.* as a consideration for his quitting the partnership concern: and whereas my said son *P. J. Breach* is also justly indebted to me in the sum of 306*l.* 1*s.* 3*d.* upon his bond bearing date the 25th day of March 1832, payable with interest: Now I do hereby declare and direct that the said several sums of 500*l.* and 306*l.* 1*s.* 3*d.* or so much thereof respectively as shall be owing to me at the time of my decease, shall be deducted from the share of my said son *P. J. Breach* of my said residuary estate, but that no interest due or to become due in respect of either of the said principal sums, shall be demanded from or paid by him my said son: And whereas, upon the marriage of my said son-in-law *Charles Williams* with my said daughter *Susan Elizabeth*, I gave and paid, to the said *Charles Williams*, the sum of 1,000*l.* as a marriage portion with my said daughter; and my said son-in-law is also justly indebted to me in the sum of 2,256*l.* 1*s.* 3*d.* upon his bond bearing date the 25th March 1832, and also in the further sum of 1,500*l.* on his bond bearing date the 20th day of December 1834: Now I do hereby declare and direct that the said sum of 1,000*l.* so paid to the said *C. Williams* as a marriage portion, and also the said two several sums of 2,256*l.* 1*s.* 3*d.* and 1,500*l.*, with any interest that may be due or become due on the said sum of 1,500*l.*, but exclusive of any interest

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(which shall not be demanded from or paid by the said *C. Williams*) on the said sums of 1,000*l.* and 2,256*l.* 1*s.* 3*d.*, or either of them, or so much thereof respectively as shall be owing to me at the time of my decease, *shall be taken or allowed in account*, as part of the share of his wife (my said daughter *Susan Elizabeth*) of my said residuary estate: and in case the balance shall appear to be against the said *Charles Williams* and *Susan Elizabeth* his wife, then I request and direct my trustees and executors *to refrain from putting in force the aforesaid bonds, or either of them, against the said C. Williams*, and also to refrain from calling for or enforcing immediate payment of all or any part of such balance, but to require and take from the said *C. Williams* such security, real or personal, for the payment thereof, with lawful interest, by instalments at such periods and in such manner as my said executors, in their discretion, shall think fit; but, nevertheless, upon the terms that the said *C. Williams*, his executors or administrators, do and shall secure and assure the payment of the interest of such balance, by equal half-yearly payments, upon the trusts and for the purposes of this my will."

Susan Elizabeth Williams died in September 1836. The testator died in February 1841.

The bill was filed, by the executors and trustees of the will, against *C. Williams* and his children by his late wife, and against *Philip James Breach*, to have the trusts of the will performed and the rights and interests of the parties to and in the testator's residuary estate ascertained and declared by the Court. It stated that *Philip James Breach* and *Charles Williams* were indebted to the testator, at his death, in the principal

sums in which they were stated, in his will, to be indebted to him, together with a considerable arrear of interest thereon: that, so far as the testator's liabilities had come to the knowledge of the Plaintiffs, his assets were sufficient to discharge all such liabilities and to provide for the pecuniary legacies given by his will; and, so far as the Plaintiffs had been able to ascertain the same, the aggregate of the debts in the will stated to be owing from *Charles Williams* to the testator, did not exceed the share to which, *had Susan Elizabeth Williams survived the testator*, she would have been entitled in the testator's residuary estate, treating such debts as part of his residuary estate: that *Charles Williams* claimed to treat the provision in the will touching the debts or aggregate of debts therein stated to be owing from him to the testator, *as amounting to a legacy or a release to himself thereof, and to remain unaffected accordingly by the death of his wife*; and that, under such circumstances, he insisted on a right to retain such debts and to be protected from all proceedings for recovery of the same; and that he further alleged that he was in insolvent circumstances and wholly unable to pay such debts or to give any security for the same: while *Philip James Breach* and the children of *Susan Elizabeth Williams*, alleged the provision insisted on by *C. Williams*, to amount only *to a legacy, to his wife, of the debt owing from him to the testator as in the will mentioned, and that the same having lapsed by her death*, had become undisposed of and distributable amongst the testator's next of kin, that is to say, amongst the children of *Susan Elizabeth Williams* as representing their late mother, and *Philip James Breach**.

* The principal question that arose in the suit was thus shortly and clearly stated in a case which the Plaintiffs laid

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The cause now came on to be heard.

Mr. *Wakefield* and Mr. *Goodeve*, for the Plaintiffs, the executors and trustees of the will.

Mr. *Bethell* and Mr. *Romilly*, for *Charles Williams*:

We submit that, according to the true construction of the will, our client is, as between himself and the testator's estate, formally released from the debts of 2,256 *l.* 1 *s.* 3 *d.* and 1,500 *l.*

The testator's object was that his son and his daughter should share his bounty equally; and, in order to effect that object, he has directed that the sums which he had advanced and lent to his son and to his son-in-law, should be treated, in the division that was to be made of his property between his son and his daughter, not as debts due to his estate, but as items of account. The personal liabilities of the son and son-in-law, are entirely put an end to, and the sums advanced and lent to them by the testator, cease to bear the character of debts, and are to be regarded only for the purposes of the account between the son and the daughter. The

before an eminent Counsel: "Whether *the whole* share of the residue bequeathed to Mrs. *Williams*, is altogether lapsed and undisposed of; or whether any and which of the sums mentioned in the will as having been given, paid or advanced to Mr. *Williams*, can be considered as bequeathed to him." The following answer was given to that question: "I am of opinion that the *whole* share of the residue bequeathed to Mrs. *Williams* is not altogether lapsed and undisposed of; but that the deductions directed to be made, from that share, in respect of the sums given, paid and advanced to Mr. *Williams*, take effect; and there is an intestacy as to the balance only, after taking into account those deductions."

testator has, in express terms, released the interest of the debts; and we submit that he has released the principal also. If the daughter had survived the testator, she could not have been treated as a creditor of her husband. A release by him, for her share of the residue exclusive of the debts, would have been a good discharge to the executors.

The next question is whether the death of the daughter in the testator's lifetime, prevents the will from operating as a release of the sums advanced and lent to her husband. We contend that the operation of the will, so far as those sums are concerned, is not at all affected by that event.

Where a testator, by his will, releases a debtor to his estate from the debt, the debtor is a legatee of the debt. Though the daughter died in the testator's lifetime, her husband is still alive; why then is he not entitled to claim the legacy left to him in the shape of a release of debts? If a testator gives a legacy of 100 *l.* to *A. B.*, and directs it to be paid out of a larger legacy given to *C. D.*; *A. B.* will not lose his legacy if *C. D.* dies in the testator's lifetime. So also, where a testator bequeaths the residue of his estate to his two children, and directs one of them to release a debt due to him from *A. B.*, but to give credit for it in account; the death of that child in the testator's lifetime, does not prevent the release of the debt from having its intended effect. If the testator's son had died shortly before the testator, it could not have been contended that his estate was liable to pay the sums which he had received from his father. Neither can it be contended that, because the daughter died in the testator's lifetime, her husband still

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remains a debtor to the testator's estate. What the testator meant was that neither his son nor his son-in-law, should be required to pay the sums which he had advanced them; but that the son should consider what had been advanced to him, as part of his share of the residue; and that the daughter should consider what had been advanced to her husband, as part of her share of the residue.

In *Hills* v. *Wirley* (*a*) the testatrix directed certain annuities to be paid by a person to whom she had given certain household goods on the condition of making those payments. The gift of the household goods failed, because the testatrix had described them as being comprised in a schedule annexed to her will; but no schedule was annexed to it. Lord *Hardwicke*, however, said: "One thing is very plain; that the testator (testatrix) intended her legatees should have the annuities; and, therefore, if there is any room to assist them, the Court will do it, notwithstanding the accident that happened of the testatrix's annexing no schedule of the household goods. * * * The essential rule, in all these cases, is that, as long as the fund itself exists upon which the legacy is charged, though it devolves either upon the heir or executor, yet they take it subject to the charge." In *Oke* v. *Heath* (*b*) a lady had power to appoint 4,000*l.* to any of her kin; and, in default of appointment, that sum was to go amongst her next of kin according to the Statute of Distributions. By her will she appointed the money to her nephew, and, in consideration thereof, he was to pay his mother an annuity for her life, and to give a bond for securing the payment of it. The nephew died

(*a*) 2 Atk. 605. (*b*) 1 Vez. 135.

n the testatrix's lifetime: Lord *Hardwicke*, however, held that the annuity was, nevertheless, a subsisting legacy, and was payable out of the testatrix's estate. *Elliot* v. *Davenport* (*c*) shows that where, as in this case, the release is independent of the gift, the release takes effect though the gift fails.

Mr. *Stuart* and Mr. *F. Bayley*, for the children of the testator's daughter:

In order to bring this case within the principle of *Elliot* v. *Davenport*, the counsel for the son-in-law ought to have shown that the will contains an *absolute* release of the debt. But this will not only does not show any intention, on the part of the testator, to release the debts in all events, but it shows an intention to keep them alive. The son-in-law was no object of the testator's bounty beyond the interest of one of the debts which he owed to the testator: and, supposing that the testator did intend that the debts due from his son-in-law, should be lost to his daughter, it by no means follows that his next of kin are to bear the loss. The testator might have considered that the daughter had benefitted by the advances made to her husband: and we submit that the effect of the will, so far as it relates to the son-in-law and the daughter, is to give, to the daughter, a legacy of so much as one moiety of the residue should exceed the debts due from her husband.

Mr. *John Baily*, for the testator's son, who, as one of the testator's next of kin, was in the same interest as Mrs. *Williams*'s children, relied on *Elliot* v. *Davenport* as an authority in his favour; because in this case as in

(*c*) 1 P. W. 83.

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that, the release was connected with and dependent on the gift; and, the gift having failed, the release failed with it.

The VICE-CHANCELLOR:

Although it is perfectly true that the primary object of the testator was an equal division of the residue of his personal estate between his son and his daughter, yet it appears to me impossible not to see that he did intend a certain benefit to his son-in-law; and that benefit was to be had in this manner. The will contains a recital of a certain quantity of debt due from the son, which, to a certain extent, the son is released from. That is not very material. I am not bound to consider, as regards the son, what was the effect of that. But then, with respect to the son-in-law, the will recites that the testator had paid to him 1,000*l.* on his marriage, and that the son-in-law was indebted, to the testator, in two other sums, the amount of which is stated, on his bonds. Then the testator directs that those three sums: "shall be taken or allowed in account as part of the share of his wife, of my residuary estate; and, in case the balance shall appear to be against the said *Charles Williams* and *Susan Elizabeth* his wife, then I request and direct my trustees and executors to refrain from putting in force the aforesaid bonds, or either of them." By which I understand he means that an equation shall be struck between, on one side, the quantity of debt due from the son; and, on the other, that sum which would be composed of the 1,000*l.* advanced upon the marriage of the son-in-law, and of the other two sums which were due from the son-in-law on his bonds; and that, when the equation is made, the trustees shall no longer put in force the aforesaid bonds. It is quite plain that the testator was perfectly

aware of what he was about: he says: "they shall no longer put in force the aforesaid bonds, or either of them, against the said *Charles Williams*;" which is a direction, in effect, that he shall be released from the bonds. Shortly afterwards, the testator directs the trustees and executors: "to refrain from calling for or enforcing immediate payment of all or any part of such balance; but to require and take, from the said *Charles Williams*, such security, real or personal, for the payment thereof, with lawful interest, by instalments, at such periods and in such manner as my executors, in their discretion, shall think fit." The will, therefore, directly operates to change the whole nature of the debt which was due from *Charles Williams*, the son-in-law, to the testator: for the operation will be, first of all, to determine what it is that shall ultimately be payable by him; and next to declare that the bonds which he had given, shall not be enforced at all; and, thirdly, that for that amount which, upon the striking of the balance, shall be determined to be due, such security shall be given, real or personal, as the executors may determine upon; which they could not have done without the direction of the testator. Therefore, my opinion is that the death of the testator's daughter has made no difference with respect to that part of the transaction.

11th July.

The cause was placed in the paper on this day, in order that the minutes of the decree, which the parties had not been able to agree upon amongst themselves, might be settled; and, after some discussion, they were arranged as follows:

Declare that *John Breach* the testator has, by his will, released the Defendant, *Charles Williams*, from all

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interest which may have accrued due on the sum of 2,256*l.* 1*s.* 3*d.* in the pleadings mentioned: and declare that the testator has also released the Defendant *C. Williams* from all sums due to him at the time of his death in respect of the sums of 2,256*l.* 1*s.* 3*d.* and 1,500*l.* in the will mentioned, provided those sums, together with interest on the last-mentioned sum up to the day of the death of the testator, and together with the sum of 1,000*l.* advanced by the testator on the marriage of the said Defendant, shall not exceed, and to such extent only as the same shall not exceed the half part of the residue of the estate of the testator, to be calculated as hereinafter is directed: and let it be referred to the *Master* to inquire and state who were the next of kin of the testator at the time of his death; and, in case the *Master* shall find that all such next of kin are parties to this suit, let the *Master* take an account of the personal estate and effects of the testator come to the hands of the Plaintiffs, his executors, they submitting to account, or to the hands of any other person or persons &c. &c.: and let the *Master* take an account of the testator's debts, funeral and testamentary expenses and legacies, and compute interest on his debts and legacies &c.: and the *Master* is to cause advertisements to be published for creditors, &c.: and let the *Master* inquire and state what was due to the testator at the time of his death, in respect of the sums of 500*l.* and 306*l.* 1*s.* 3*d.*, from the Defendant *Philip James Breach*: and let the *Master* also ascertain what was due to the testator at the time of his decease, in respect of the sums of 2,256*l.* 1*s.* 3*d.* and 1,500*l.*: and let the *Master* ascertain the clear residue of the testator's estate, after payment of his debts &c.: and let the *Master* include in his account of the testator's residuary personal estate, the sums of 500*l.* and 306*l.* 1*s.* 3*d.*,

and also the sums of 1,000 *l.*, 2,256 *l.* 1 *s.* 3 *d.*, and 1,500 *l.*, with the interest which the *Master* shall find to have been, at the time of the death of the testator, due thereon: and let the *Master* divide such clear residue into two equal half parts; and declare that the Defendant *Philip James Breach* is entitled to one of such half parts, after deducting therefrom what may be so found due in respect of the sums of 500 *l.* and 306 *l.* 1 *s.* 3 *d.*: and declare that in case the sum to be found due from the Defendant *Charles Williams* as aforesaid shall exceed the half part of such residuary estate, so to be calculated and ascertained as aforesaid, then the Defendant *Philip James Breach* is entitled to so much as the sum to be found due from *Charles Williams* shall exceed the half part of such residuary estate so to be calculated and ascertained as aforesaid; and if the amount to be found due from the Defendant *Charles Williams* shall fall short of the half part of the residue so to be ascertained and calculated as aforesaid, then declare that the next of kin of the testator at the time of his decease, are entitled to so much of the half part of the residue, so to be calculated and ascertained as aforesaid, as shall exceed the amount to be found due from the Defendant *Charles Williams* as aforesaid: and, for the better taking of such accounts &c.

1842:
28th April.

Plaintiff. Practice.

Plaintiffs filed a supplemental bill for the purpose of bringing before the Court the assignees of a Defendant who had become bankrupt. The Plaintiffs were fully described in the original bill, but, in the supplemental bill, their places of residence were omitted. Held, on motion, that they must give security for costs.

CAMPBELL *v.* ANDREWS *.

THIS was a supplemental suit, for the purpose of bringing before the Court the assignees of a Defendant to the original bill, who became bankrupt pending the suit. The Plaintiffs were, in fact, the same persons as were Plaintiffs in the original suit: but, in the supplemental bill, they were not described except by their names; and, on that account,

Mr. *Bethell* and Mr. *Webster*, for the assignees, now moved, before answer, either that the supplemental bill might be taken off the file, with costs; or that all proceedings might be stayed until the Plaintiffs should have either given security for costs, or amended the supplemental bill by inserting their places of residence. They said that the bill was an original one, as against the assignees, and that they were not bound to look out of it for the description of the parties who were suing them.

Mr. *K. Parker* and Mr. *Grove* said that the original bill contained a full description of the Plaintiffs, and that, if there was anything in the objection, it ought to have been taken by demurrer and not by motion.

The *Vice-Chancellor* said that, for anything that appeared to the contrary, the Plaintiffs might have changed their places of residence, or even be out of the jurisdiction; and that they must give security for the costs of the supplemental suit, and all proceedings in it must be stayed in the meantime; and also that they must pay the costs of the motion.

* *Ex relatione.*

MARTIN *v.* MARTIN.

1842: 4th May.

Will. Construction. Advowson. Next presentation. Intestacy.

THE Rev. *William Marsden*, by his will dated the 18th day of August 1840, gave his advowson and right of patronage and presentation of and to the rectory of *Everingham* in *Yorkshire*, of which (as he mentioned) he was incumbent, with the rights, privi-

A testator, who was both patron and incumbent of a living, devised the advowson and all his other real estates, and also his personal estate, to trustees in trust to pay the *rents*, dividends, interest, and annual income of his real estates, until they should be sold as thereinafter directed, and also of his personal estate, to his sister, until she should have a child, and immediately after her having a child, in trust to stand seised and possessed of his real estates, if not then sold, and of his personal estate and the *rents*, dividends, interest and annual income thereof, in trust for her children or child who should attain 21, their heirs &c.; and if she should have no such child, then in trust, after her death, for the trustees, their heirs &c. The testator then directed his trustees to sell the advowson and his other real estates, with all convenient speed after his death, and to stand possessed of the proceeds upon the trusts before declared of his personal estate: and he empowered his trustees to apply the *rents*, dividends, interest and annual income of the presumptive shares of his sister's children, of his real estates (if not then sold), and, if sold, then of the money arising therefrom, and of his personal estate, for their maintenance during their minorities; and directed that the surplus *rents*, dividends, interest and annual income should be invested and accumulated for the benefit of the children from whose shares the same should be saved.

At the testator's death, his sister (who was his heir) had three infant children; and his living having become vacant by his death, the question was whether the children, their mother or the trustees were entitled to present to it. Held that, as the presentation to a living does not produce *rents*, dividends, interest or annual income, the dispositions of the will were not applicable to that species of property, and, consequently, that the testator's sister was entitled, as his heir at law, to present to the living on the existing vacancy.

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leges, and appurtenances belonging thereto, and all glebe-lands, tithes, tenths, oblations, obventions, fruits, offerings, dues, duties, emoluments and advantages whatsoever to the said advowson belonging, and all houses, outhouses &c. whatsoever to the said advowson belonging, and also his three cottages in *Chorley* in the county of *Lancaster*, and his close of land in the parish of *Kirkham* in the same county, and his three messuages in the town and county of the town of *Nottingham*, late the property of his uncle *William Marsden*, esquire, and all other his real estate, subject nevertheless to an annuity of 130 *l.*, and to another annuity of 20 *l.*, then already charged upon the messuages in *Nottingham* by his late uncle, and also his leasehold messuage and premises in the borough of *Southwark*, and all his canal shares, money, securities for money, goods, chattels, personal estate and effects whatsoever and wheresoever, subject to the payment of his just debts, funeral and testamentary expenses and the annuities and legacies given by his will, unto and to the use of his friends the Rev. *John Blew*, and the Rev. *John Grant Lawford*, their heirs, executors &c., upon trust, when and as they, in their discretion, should see proper for the benefit of his estate, to sell and convert into money all such parts of his personal estate and effects as should not consist of money or securities for money, and to call in such parts thereof as should consist of monies or securities for money (except mortgages), and thereupon, with all convenient speed, to place out and invest the monies arising by such sales and to be called in as last mentioned, on government or real securities, and to stand seised and possessed of his said real estates, and also of his said personal estate and effects, and the securities upon which the same should be invested, in trust to receive the *rents*,

dividends and annual income of his said real estates, until the same should be sold as thereinafter contained, and also of his said personal estate, and thereout to pay the annuities before mentioned and certain other annuities, and in trust, during such time or times as his dear sister *Charlotte*, the wife of *William John Martin*, should not have any child or children by the said *William John Martin* actually born and living, to pay the whole of the said *rents*, dividends, interest and annual income of his said real estates until the same should be sold as thereinafter contained, and also of his said personal estate, subject to the payment thereout of the before-mentioned annuities, to his said sister *Charlotte* during her life for her separate use; and, in case his said sister should have a child or children born alive by the said *William John Martin* as aforesaid, he directed that, from and immediately after the birth of such child or children, his trustees should stand seised and possessed of all his said real estates, if not then previously sold, and also of his said personal estate and effects, and the securities upon which the same might be invested, and the future and accruing *rents*, dividends, interest and annual income thereof, after payment thereout of the aforesaid annuities, in trust for all and every the children and child of his said sister by the said *W. J. Martin* who should attain the age of 21 years, and their respective heirs, executors &c., to be divided between them, if more than one, in equal proportions, and if his said sister should not have any children or child who, under the trusts aforesaid, should become entitled to his said real estates if unsold as aforesaid, and to his said personal estate and effects, and the securities upon which the same should be invested, then, in trust, after her decease and such failure of her issue as aforesaid, to divide, convey and assign all his said real and

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personal estates, and the rents, dividends, interest and annual produce thereof, subject to the payment thereout of the aforesaid annuities, unto and between his said two friends, *William John Blew* and *John Grant Lanford*, their heirs, executors, &c. in equal shares, as tenants in common: provided that, in case his said sister should have any child or children by her said husband born and alive, and all of them should afterwards die in her lifetime without having attained the age of 21 years, then and so often as the same might happen, the right of his sister to the income of his said real and personal estates should revive: provided that his trustee or trustees for the time being should have a discretionary power either to retain or at any time or times to sell his canal shares when and as they and he might think it most desirable and advantageous for his personal estate. The testator then expressed himself as follows: "Provided also, and it is my further will and intention, and I hereby direct that, *with all convenient speed after my decease, as to my said advowson of the rectory of the parish and parish church of Everingham aforesaid*, and the glebe-lands, tithes, tenths, oblations, obventions, fruits, offerings, dues, duties, emoluments and advantages, and the houses, outhouses, &c. and appurtenances whatsoever to the said advowson belonging or in anywise appertaining, and also my said cottages situate at *Chorley* aforesaid, and also my said close of land situate at *Kirkham* aforesaid, and also all other my said real estates whatsoever and wheresoever given and devised to them by this my will, and also my said leasehold messuage and premises situate in the borough of *Southwark*, and that with all convenient speed after the death of the survivor of the aforesaid annuitants, as to my messuages in the town of *Nottingham* aforesaid, the trustee or trustees for the time being of this my will

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shall sell and absolutely dispose of all and singular my said real estates at the times or periods last mentioned, freed and discharged from all liability in respect of the aforesaid annuities, or any of them, as the case may be, either together or in parcels, by public auction or private contract, with full power to buy in the same or any part thereof at any public auction, and also to rescind or vary the terms of any contract for sale, and afterwards to resell the same, and to convey and assure the same, when sold, unto the purchaser or purchasers thereof, or as he or they shall direct. And my will further is that my said trustees or trustee for the time being shall lay out and invest the clear amount of the monies which shall arise from such sale or sales as aforesaid, upon the same or the like stocks, funds or securities, and shall stand and be possessed of and interested in the last-mentioned monies, stocks, funds and securities, and the interest, dividends and annual income thereof, upon, for, under and subject to such and the same trusts, intents and purposes, powers and provisions, as hereinbefore directed, expressed and declared with regard to the residue of my said personal estate and effects, or such or so many of them as shall be then subsisting or capable of taking effect: provided always, and I hereby further will and declare that my said trustees and trustee for the time being shall and may, if they and he shall think proper, and at their or his discretion, during the minority of any child or children of my said sister, pay or apply the *rents*, dividends, interest and annual income of the presumptive share or shares of the same child or children, of and in my said real estates, if not then sold as hereinbefore directed, and if sold, then of the money arising therefrom, and also of and in my said personal estate and effects under the trusts aforesaid, for and towards the

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maintenance, education, and advancement of such child or children, and *that all the surplus rents*, dividends, interest and annual income which shall not be applied for that purpose, shall be invested in the public funds, or government or real securities, *and allowed to accumulate*, in the nature of compound interest, for the benefit of the child or children from whose share or shares the same shall be saved." The testator then gave certain specific and pecuniary legacies, and appointed *William John Blew* and *John Grant Lawford* executors of his will.

The testator died on the 21st of December 1841, leaving his sister *Charlotte Martin*, his heir at law. She had three infant children by her husband *W. J. Martin*, living at the testator's death.

In March 1842, the children filed the bill in this cause, against their father and mother, Messrs. *Blew* and *Lawford*, and the annuitants under the will, praying, amongst other things, that the trusts of the will might be performed under the direction of the Court, and that new trustees might be appointed in the place of *Blew* and *Lawford*, they having, as the bill alleged, refused to act. Shortly afterwards, and before any of the Defendants had put in their answers, the Plaintiffs presented a petition in the cause, stating that, although nearly three months had elapsed since the testator's death, neither *Blew* nor *Lawford* had proved the will, nor intermeddled with the testator's estate; and that the petitioners believed that they intended to renounce the probate and to disclaim the trusts of the will: that the testator, at his death, was both patron and incumbent of the rectory of *Everingham*, and that the church had been vacant ever since his death, and no steps had been

taken for filling it; and, the petitioners were advised that it was doubtful whether the presentation to the rectory did not belong to *Charlotte Martin*, as the testator's heir; and they submitted that they were entitled to the immediate interference of the Court for the preservation of the testator's property, and that all necessary directions ought to be given for the presentation of a fit person to the church, in order that, when it should be full, the advowson might be sold according to the directions of the will. The petition prayed that it might be declared to whom the presentation to the church, on the then existing vacancy, belonged; or that it might be referred to the *Master* to approve of some fit person to be appointed to the church, and also to appoint a receiver of the testator's real and personal estates.

Mr. *Bethell* and Mr. *Ellison*, for the petitioners, said that their clients were beneficially interested in the advowson of the rectory, and that the right of presentation followed the right to the advowson; and, consequently, the petitioners were entitled to present on the existing vacancy: that the heir at law could not be entitled to present; for the testator's intention was that the advowson should be sold to the best advantage; and the heir might select a very young life, and thereby greatly prejudice the sale: that, if the trustees were the parties to present, the Court would control them in the exercise of their power, and would take care that they exercised it in a manner most beneficial to the petitioners. *Sherrard* v. *Lord Harborough* (*a*), *Hawkins* v. *Chappel* (*b*), *Holt* v. *The Bishop of Winton* (*c*), *Hill* v. *The Bishop of London* (*d*).

(*a*) Amb. 165.
(*b*) 1 Atk. 621.
(*c*) 2 Salk. 260.
(*d*) 1 Atk. 618.

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The *Vice-Chancellor*:—In *Hawkins* v. *Chappel*, the whole beneficial interest was devised: the gift was not contingent. In the present case the disposition of the beneficial interest is executory.

Mr. *G. Richards* and Mr. *Hardy*, for the trustees:

The testator was, as he mentions in his will, the incumbent of the rectory; and he must have known that the living would become vacant at his death, and that the advowson could not be sold until the vacancy was filled up. So that the right of presenting to the living on his death, is, necessarily, an incident to the sale; and, as such, it belongs to the trustees by whom the advowson is to be sold. Besides, the interests of the children are contingent; and, if none of them attain 21, the trustees will take beneficially under the will. Again, the testator, in the provision which he makes for the children of his sister, uses the words, *rents, interest, and dividends:* but none of those terms are applicable to the next presentation to a living, for it produces no income whatever.

The heir can not be entitled to present; for, if she were allowed to do so, she might deteriorate the value of the advowson by presenting a clerk who, only shortly before, had taken holy orders (*e*).

Mr. *Goulburn* for Mr. and Mrs. *Martin*, the latter of whom was the testator's heir.

The VICE-CHANCELLOR:

I do not want to hear the counsel for the heir at law. This seems to me to be a very simple question.

(*e*) *Seymour* v. *Bennet*, 2 Atk. 482.

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The trusts of the will are in the nature of executory devises; because the objects of those trusts are such of the children of the testator's sister who should attain 21: and, in case the sister should have no child who should attain that age, then the trustees themselves are the objects of the trust. Consequently, as the sister had children at the death of the testator, those children are executory devisees of the trust. Then there is a direction that the trustees should sell the advowson: but they have not sold it; and, by the death of the testator, the church has become vacant. Then there is a direction that, during the minorities of the children, the trustees should apply the rents, dividends, interest and annual income of their presumptive shares for their maintenance, education, and advancement: and, after that, there is a direction that all the surplus rents, dividends, interest and annual income which should not be so applied, should be invested in the funds and accumulated.

Now, though the law does hold a presentation to a living to be a beneficial interest; yet it can not be the means of producing an income either for the maintenance of children or for the purpose of forming an accumulating fund. Therefore, I think that no beneficial interest in the presentation now in question, is given to the children; but it is like any other thing which becomes separated from the rest of the devise; that is, it has descended to the heir at law.

Declare that the testator's heir at law is entitled to present to the living on the existing vacancy.

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1842: 4th, 6th, & 7th May.

Will. Construction. Intestacy. Implication.

Testator being seised in fee of a house in the town of *C.*, and of estates in the counties of *H.* and *L.*, gave pecuniary legacies to his two sons (one of whom was his heir), and also to his two daughters, *M.* and *C.* He then gave to his wife, for her life, the possession of his house, together with the use of his plate, furniture, &c, and the interest of his stock in the funds, during her life; "save and except the clauses in favour of my daughters, as already mentioned: at her decease, it is my will and pleasure that *M.* and *C. shall divide equally between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others.*" Held that *M.* and *C.* took an estate in fee in remainder expectant on the death of the testator's widow, in the house in *C.*, and an estate in fee commencing on the widow's decease, in the estates in *H.* and *L.*; and that the widow did not take a life-interest by implication in those estates, but that the heir took them, by descent, during her life.

IN pursuance of the decree made at the hearing of this cause, in February 1841, the following case was stated for the opinion of the Judges of the Exchequer.

George Coltman was at the time of making his will hereinafter mentioned, and thenceforth continued until and at the time of his death, seised in fee simple of the house in *Stanley-place, Chester*, in his will mentioned, and also of a certain tenement in the county of *Lincoln*, and a certain other tenement in the county of *Hertford*. The said *George Coltman*, being so seised as aforesaid, and being also possessed of certain sums of money in the 3*l.* per cent. and 4*l.* per cent. bank annuities, and of an interest in the leasehold houses at *Liverpool* in the will mentioned, and of the other personal estate therein also mentioned, duly made his last will and testament, bearing date the 26th of March 1828, which was duly executed and attested as by law was then required for the devise of real estates, and which was in the words and figures following, that is to say:

"The will of *George Coltman*, doctor of physic, now resident in *Chester*, made on the 26th day of March, in

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the year 1828 of the Christian era. I revoke all former wills. To my son, *Thomas Coltman*, I bequeath my gold watch, chain and seals, my carriages, harness and horses, and cows, market cart and harness for the same, also whatever is considered as belonging to me at my new residence in *Hagnaby Priory*. To my daughter, *Mary Newbold*, I bequeath the sum of 250*l.* per annum; and, in case of her death and without issue, the same sum to her husband, for his natural life, and, afterwards, to be equally divided between my son, *George Coltman*, and daughter, *Charlotte Coltman*. To my daughter, *Charlotte Coltman*, I bequeath the sum of 250*l.* per annum; and in case she should continue unmarried or die without issue, the same shall be taken possession of by her brother, *George Coltman*. To my son, *George Coltman*, I bequeath the sum of 3,000*l.*, which he is not to receive till after the death of his mother, and likewise, at her decease, all the plate which I may die possessed of, but, at my decease, he is to have, immediately, the whole of my library at his own disposal. That my wife, *Mary Coltman*, may be left in as comfortable a situation as possible, I bequeath to her, for her natural life, the possession of my house in *Stanley-place, Chester*, together with the use of the plate, china, linen, and household furniture, and all the joint property in houses in *Liverpool*, and likewise of interest of money as often as due, arising from the three and four per cents., and to have and to hold the same during her natural life, save and except the clauses in favour of my daughters as already mentioned. *At her decease it is my will and pleasure that Mary Newbold and Charlotte Coltman shall divide equally between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others.* I give and bequeath the small sum of 50*l.* to my much

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esteemed friend, *John Eden*, esq., attorney at law, of *Liverpool*. To *Betty Moffitt* I give and bequeath the sum of 18*l.* per annum for her natural life. This is done as a small token of friendship for her long and important services in my family. That the intention of this my will may be carried into execution, I appoint my wife my executrix, *John Eden*, esq., and my son, *Thomas Coltman*, executors. As for the houses in *Liverpool*, they may dispose of any one or the whole of them whenever the same may be thought advisable for the benefit of the parties concerned; but the house in *Chester* must not be sold as long as my wife lives."

The said testator, *George Coltman*, died on the 3d day of August 1828, without having in any manner revoked or altered his said will, leaving his wife, the said *Mary Coltman*, and also the four children named in his said will, that is to say, *Thomas Coltman*, who was his eldest son and heir at law, *George Coltman*, *Mary Newbold* (since deceased), and *Charlotte Coltman*, who has since become the wife of *John Davenport* the younger, his only next of kin him surviving.

The questions for the opinion of the Court are,

First, what estate, if any, did the said *Mary Coltman*, the wife of the said testator, *George Coltman*, take in the said tenements in the counties of *Lincoln* and *Hertford* under the will of the said testator;

Secondly, what estate, if any, did the said *Mary Newbold* and *Charlotte Davenport*, the daughters of the said testator, or either and which of them, take in the said tenements in the counties of *Lincoln* and *Hertford* under the said will; and,

Thirdly, what estate, if any, did the said *Mary Newbold*, and *Charlotte Davenport*, or either and which of them, take in the said house or tenement in *Stanley-place, Chester*, under the same will.

The case was argued in Michaelmas Term 1841, and on the 31st of January 1842, the Barons of the Exchequer certified,

First, that *Mary Coltman*, the wife of the testator, took no estate in the tenements in the counties of *Lincoln* and *Herts*.

Secondly, that *Mary Newbold* and *Charlotte Davenport* took an estate, as tenants in common in fee simple, in the tenements in *Lincolnshire* and *Herts*, under the said will, commencing at the death of the said testator's widow.*

Thirdly, that the said *Mary Newbold* and *Charlotte Davenport* took an estate as tenants in common in fee simple in the *Stanley-place* house in remainder expectant on the life estate of the widow†.

* The opinion of the Barons of the Exchequer seems to have been founded upon the comprehensive effect of the expression: "whatever I may die possessed of." But was not the effect of that expression limited by the preceding words: "at her decease?" Did not those words show that the testator meant that his daughters should divide between them what he had given to his wife for life, and nothing more? If not, why did he postpone the division until the death of his wife? It will appear, from the second part of this report, commencing at page 610, that (whatever might be the legal effect of the expression above referred to) the testator could not *intend* it to have the effect attributed to it; inasmuch as he did not know, when he made his will, that the *Lincolnshire* and *Herts* estates were his property.

† *See* 9 Mees. & Wels. 481.

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The cause now came on to be heard on the equity reserved.

Mr. *Bethell* and Mr. *Willcock* for the Plaintiff, the testator's daughter, *Charlotte Davenport*, supported the certificate. They cited *Huxtep* v. *Brooman* (*a*); *Hopewell* v. *Ackland* (*b*); *Pitman* v. *Stevens* (*c*); *Hyley* v. *Hyley* (*d*); *Tanner* v. *Morse* (*e*); *Monk* v. *Mawdsley* (*f*); *Murry* v. *Wyse* (*g*); *Doe* v. *Tofield* (*h*); *Wilce* v. *Wilce* (*i*); *Noel* v. *Hoy* (*k*); *Barnes* v. *Patch* (*l*); *Thomas* v. *Phelps* (*m*).

Mr. *Koe*, for *Francis George Newbold*, the heir at law of testator's daughter, *Mary Newbold*, also supported the certificate; he cited *Doe* v. *Lainchbury* (*n*), and *Doe* v. *Langlands* (*o*).

Mr. *G. Richards* and Mr. *Lee*, for *Thomas Coltman*, the testator's heir at law:

The testator's *Hertfordshire* and *Lincolnshire* estates were of very considerable value; and it is but reasonable to suppose that the testator, if he had intended to dispose of them, would have mentioned them specifically. He has left nothing to his heir at law except articles of trifling value; and the fair presumption is that he did not leave him any thing more, because he knew that the law would provide for him. The words, "whatever I may die possessed of," are not only general and inappropriate to real estate, but show

(*a*) 1 Bro. C. C. 437.
(*b*) 1 Salk. 239.
(*c*) 15 East, 505.
(*d*) 3 Mod. 228.
(*e*) Ca. Temp. Talb. 284.
(*f*) *Ante*, Vol. I. 286.
(*g*) 2 Vern, 564.
(*h*) 11 East, 246.
(*i*) 7 Bing. 664.
(*k*) 5 Madd. 38.
(*l*) 8 Ves. 604.
(*m*) 4 Russ. 348.
(*n*) 11 East, 290.
(*o*) 14 East, 370.

that the testator was looking at what he might be possessed of at his death: and, however liberally those words may be construed, they could not, as the law stood when this will took effect, have been held to include real estate which the testator acquired after the date of his will. The case principally relied on by the Barons of the Exchequer, was *Huxtep* v. *Brooman*. There the words as to the effect of which the Court had to decide, were, "all I am worth." Those words showed that the testator intended to dispose of property which he had at the time when he made his will, and, accordingly, they were held to include real estate; but it by no means follows that the Court would have come to the same conclusion, if the words had been, "all I may be worth at my death," that is, if they had been applicable, as they are in this case, to property subsequently acquired. In *Barnes* v. *Patch*, the words were totally dissimilar to those in the present case; they were, "the whole residue of my estate:" and it clearly appears, from the judgment, that the *Master of the Rolls* came to the conclusion which he did in that case, because the word, "estate," was used. In *Pitman* v. *Stevens*, the testator commenced his will by expressing an intention to dispose of all that he should die possessed of, real and personal: and, in the very next sentence, he appointed Captain *Preston* his residuary legatee and executor; and, after giving certain legacies, he recommended Captain *Preston* to be kind to his brother in law: so that it was evident that he contemplated, as Lord *Ellenborough* says in his judgment, that Captain *Preston* would have all his funds, real and personal, that he should die possessed of and should not have otherwise bequeathed. In *Hyley* v. *Hyley*, the question was what effect ought to be given to the word, "estate." But we are now contending, not that real estate will not

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pass by the word, "estate," but that it will not pass by the words, "whatever I may die possessed of." In *Murry* v. *Wyse*, the question was not whether real estate would pass by the words used (for, as to that, there could be no doubt); but what quantity of interest passed: and all that that case decides, is that, by the words, "all the rest and residue of my real estate," a fee-simple will pass. The case of *Doe* v. *Tofield* shows, merely, that words applicable to personal estate, will pass real estate, where it clearly appears, from words which the testator subsequently uses, that he is, in fact, disposing of real estate. That case shows nothing more than this: that if a testator were to give all his personal estate, called *Blackacre*, situate in a certain parish, *Blackacre* would pass. In *Wilce* v. *Wilce* the decision was founded on the introductory words in the will: "As touching such worldly property wherewith it hath pleased God to bless me in this world, I give, devise and dispose of the same in the following manner." That case, indeed, is in our favour; for it appears from the judgment of *Tindal*, C. J. that, unless the testator had, by the preamble to his will, disclosed his intention to dispose of the whole of his property of every kind, that learned Judge would not have held that real estate passed by the words, "every thing else I may die possessed of." In *Doe* v. *Lainchbury*, a testator devised all the residue of his money, stock, property and effects of what nature or kind soever; and it was held that the words, "property and effects," passed real as well as personal estate; because it appeared, from other parts of his will, that the testator had applied those words to real estate. Indeed, he began his will by stating: "As to my money and *effects*, I dispose thereof as follows:" and then proceeded to dispose of parts of his real estates. That case, therefore, resembles *Doe* v. *Tofield*, and is totally

unlike the one which we are now discussing. In *Doe* v. *Langlands*, the word, "property," was used, and Lord *Ellenborough*, C. J., held that, taking the whole of the will together, that word would pass real estate. The same observation applies to *Thomas* v. *Phelps* as to *Wilce* v. *Wilce*, namely, that the preamble to the will showed an intention, on the part of the testator, to dispose of the whole of his property. Moreover the testator disposed merely of what he *then* was possessed of. In *Noel* v. *Hoy* the word on which the question arose, was "property." That word is as applicable to real as it is to personal property; and it has been always held so to be, unless there was something, in the prior part of the will, to confine it to personal estate.

In the present case, there is no introductory clause, as there was in some of the cases which have been cited in support of the certificate, nor is there any expression in any part of the will which shows that the daughters were intended to take real estate. The words, "shall divide equally between them," are not applicable, in common parlance at least, to real property, nor are the words, "residuary legatees." There is nothing to show that the testator intended his daughters to take any thing but personal estate under the residuary bequest. The clause, "except what is already mentioned in favour of others," cannot apply to the *Stanley-place* house; for, in the first place, it had been already mentioned; and, in the next place, it would have been useless to except it; for the time when the division was to take place, was the decease of the testator's wife, and then the wife's prior interest in the house would have expired. All that the testator meant to include in the exception, was what he had before bequeathed to his sons. If then, as we submit, the *Stanley-place*

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house was not included in the exception, the ground on which the Barons of the Exchequer arrived at the conclusion that the testator intended his other real estates to pass by his will, wholly fails. Supposing, however, that the *Stanley-place* house is included in the exception, it by no means follows that the *Hertfordshire* and *Lincolnshire* estates are also included in it. Is it a matter of no importance that the testator has mentioned one estate, but has taken no notice of the rest? Besides, it must be borne in mind that the party for whom we appear, is the heir at law of the testator: and there is no rule of law which, hitherto at least, has been more strictly adhered to than that which prescribes that an heir shall not be disinherited, except either by express words or necessary implication. Where property is claimed by a devisee on the one hand and by the heir on the other, and the right of the devisee is at all doubtful, the heir must have the benefit of that doubt. The Barons of the Exchequer, however, seem to have considered that the heir's legal right was not at all to be regarded; and that he might be disinherited by a constructive devise.

The following cases were cited by Mr. *Richards* and Mr. *Lee* in support of their argument. *Doe* v. *Yeud* (*p*); *Wilkinson* v. *Merryland* (*q*); *Shaw* v. *Bull* (*r*); *Timewell* v. *Perkins* (*s*); *Bebb* v. *Penoyre* (*t*); *Henderson* v. *Farbridge* (*u*); *Doe* v. *Rout* (*x*); *Doe* v. *Dring* (*y*); *Hogan* v. *Jackson* (*z*); *Upton* v. *Lord Ferrers* (*a*).

(*p*) 2 New Rep. 214.
(*q*) Cro. Car. 447.
(*r*) 12 Mod. 592.
(*s*) 2 Atk. 102.
(*t*) 11 East, 160.
(*u*) 1 Russ. 479.
(*x*) 7 Taunt. 79.
(*y*) 2 Mau. & Selw. 448.
(*z*) Cowp. 299.
(*a*) 5 Ves. 801.

Mr. *Parker* and Mr. *Mylne* for *Mary Coltman*, the testator's widow, contended that that lady took an estate for life, by implication, in the *Hertfordshire* and *Lincolnshire* estates. They cited *Blackwell* v. *Bull* (*b*).

Mr. *K. Parker* and Mr. *Lonsdale*, for the Defendant *William Walker*.

Mr. *Briggs* for another Defendant.

The VICE-CHANCELLOR:

7th May.

I am clearly of opinion that the judgment of the Court of Exchequer is perfectly right.

I am glad that this case has been so fully discussed; as I believe that most of the principles of law, and most of the cases that could be cited on the subject, have been quoted. But the great use of quoting cases when the question is what is the meaning of a particular will, is that you may, by the cases, establish some rule of law which may have been doubtful, or show that certain words have received a given meaning. Beyond that, it does not appear to me that, generally speaking, the citing of a number of cases of construction upon a vast variety of wills made by different persons, tends to illustrate the particular question which is before the Court; namely, what was the meaning of the testator whose will is under consideration.

I am quite willing to admit that the rule of law is that the heir takes whatever is not given away. About that there is no doubt. And I am quite willing also to admit

(*b*) 1 Keen, 176.

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that such a word as the word, "effects," standing by itself, would be, *primâ facie*, taken to be applicable to personal property only. I will, however, put this case with respect to the word, "effects." Suppose a man was seised in fee of divers tenements *A.*, *B.* and *C.*, and he made his will and said: "I give all my effects to my wife, except my tenement *A.*" There is no doubt, I should conceive, that though, in general, the word, "effects," would pass only that which was of a personal nature, yet the exception would show what it was that the testator intended by the use of that word.

It appears, upon the face of the will now before me, that it was made by a medical gentleman; and a total absence of all knowledge of law appears in it from the beginning to the end. But it is not to be held that, merely because a man does not use legal phrases, therefore, he is to be taken, at all events, to die intestate.

We will now examine what the testator has himself said. First of all, he states himself to be a doctor of physic; and then he says: "I revoke all my former wills. To my son, *Thomas Coltman*, I bequeath my gold watch, chain and seals, my carriages, harness, and horses and cows, market-cart and harness for the same, also whatever is considered as belonging to me at my new residence in *Hagnaby Priory*." Now, that expression struck me as the expression of a man who, by the very use of it, shows that he was not likely to understand legal phrases, or very conversant with the precision of language: because it is observable that he does not give what belongs to him, but whatever is considered as belonging to him; although it is uncertain who are the persons whose consideration he alludes to. Then he goes on to say: "To my daughter, *Mary Newbold*,

I bequeath the sum of 250 *l.* per annum; and in case of her death and without issue, the same sum to her husband for his natural life, and, afterwards, to be equally divided between my son, *George Coltman*, and daughter, *Charlotte Coltman*." An observation arises there upon the use of the words, "and without issue." I am not, however, called upon, at present, to decide what they mean. But it is quite plain that a question will arise upon those words. Then the testator says: "To my daughter, *Charlotte Coltman*, I bequeath the sum of 250 *l.* per annum; and, in case she should continue unmarried or die without issue," (there he has varied the phrase) "the same shall be taken possession of by her brother, *George Coltman*. To my son, *George Coltman*, I bequeath the sum of 3,000 *l.*, which he is not to receive till after the death of his mother; and likewise, at her decease, all the plate which I may be possessed of: but, at my decease, he is to have, immediately, the whole of my library at his owu disposal. That my wife, *Mary Coltman*, may be left in as comfortable a situation as possible, I bequeath to her, for her natural life, the possession of my house in *Stanley-place*, *Chester*, together with the use of the plate, china," &c. I lay no stress upon the words: "that my wife, *Mary Coltman*, may be left in as comfortable a situation as possible," because the testator does not, by his will, profess to give her every thing; and therefore it is merely an expression, generally, of an intention to make his wife comfortable; but, of course, taking care to limit the degree of comfort that shall arise in the enjoyment of his property. He says: "I bequeath to her, for her natural life, the possession of my house in *Stanley-place*, *Chester*, together with the use of the plate, china, linen, and household furniture, and all the joint property in houses in *Liverpool*, and likewise of interest of money, as often as due, arising

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from the three and four per cents.; and to have and to hold the same during her natural life, save and except the clauses in favour of my daughters, as already mentioned;" which appears to me to show that the testator thought that, if he had not made this exception, he should have given to his wife, for her life, all the interest arising from the three and four per cents., and, thereby, during her life, have prevented the daughters from having the two annuities of 250*l.*, which, in a preceding part of his will, he had given to them.

It is observable that, in that part of his will which I have already read, he has given, not merely interests in chattels, but a freehold interest in a freehold of inheritance. Then he proceeds:—"At her decease, it is my will and pleasure that *Mary Newbold* and *Charlotte Coltman* shall divide, equally between themselves as residuary legatees, whatever I may die possessed of, save and except what is already mentioned in favour of others;" and, upon that, the substantial question on this part of the case arises.

First of all, it was said that the words, "possessed of," do not imply and cannot be said to comprehend real property: I think Mr. *Lee*'s expression was, "of their own force, the words would not apply to real property." But is that so? In the first place, there are two sorts of language in the law; there is the language of pleading and there is the language of conversation or of writing on the subject of law; which are materially different from each other. But I do apprehend that the expression, "possessed of a fee simple," is a perfectly correct expression, used by the highest authority. Because if you will look into the 8th section of *Littleton*, you will find that that learned author thus expresses

himself in commenting on the position of law: "*possessio fratris de feodo simplici facit sororem esse hæredem.*" He says: "Where a man is seised of lands in fee simple, and hath issue a son and daughter by one venter, and a son by another venter, and die and the eldest son enter and die, without issue, the daughter shall have the land and not the younger son; yet the younger son is heir to the father but not to his brother. But, if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father. But, where the elder son, in the case aforesaid, enters after the death of his father and hath possession, there the sister shall have the land; because '*possessio fratris de feodo simplici facit sororem esse hæredem.*'" It is quite plain, therefore, that, not using the language of pleading, but using the language of the most correct of writers, "possession" is the proper word to describe the seisin of the fee simple. It is remarkable that Lord *Coke*, in his commentary upon the proposition, "*possessio fratris de feodo simplici facit sororem esse hæredem,*" says: "Hereupon four things are to be observed, every word almost being operative and material: first, that the brother must be in actual possession;" so that he speaks of the actual possession, and the actual possession of the fee simple; and, in a passage a little before that which I have just now mentioned, he puts the case in which he makes the possession of the lessee for years, the possession of the tenant in fee simple; which shows it is the same possession of the thing of which he speaks. He says: "If the father maketh a lease for years, and the lessee entereth, and dieth, and the eldest son dieth during the term, before entry or receipt of rent, the younger son of the half blood shall not inherit, but the sister; because the

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possession of the lessee for years, is the possession of the eldest son." Therefore it is perfectly plain that, whether it were a possession by himself simply, or by the lessee for years under the lease of the father, there is actually that possession of the fee simple which shall make the sister the heir. I refer to these passages for the sake only of showing that, in one of the earliest books, we have the term, "possession," used to designate the seisin of a fee simple.

In the case of *Thomas* v. *Phelps*, the testator, alluding to his son, says: "Him and my daughter *Elizabeth Phelps* I do make, constitute, and appoint my joint executor and executrix of this my last will and testament, of all that I possess in anyway belonging to me, by them freely to be enjoyed or possessed, of whatsoever nature or manner it may be." Sir *John Leach* says: "The subject of his gift is all that he possessed, in any way belonging to him, by them freely to be enjoyed or possessed, of whatsoever nature or manner it might be. These words are equivalent to a gift of all his property: and a gift of all property will not only pass real estate, but will pass all the interest of the testator in that estate;" and then he makes an observation which I will call to your attention presently. With respect to the mere words, "whatever I may die possessed of," I should say that they would comprehend not merely personal interests, but also estates in fee simple. But it is still more plain, in this particular case, because the very exception that the testator has made, marks the thing which was passing in his mind, and of which he was speaking when he used the phrase, "whatever I may die possessed of;" for he says, "whatever I may die possessed of except what is already mentioned in favour of others." Now, what had been already men-

tioned in favour of others? There had been mentioned in favour of others, not merely chattels personal and interests of a personal nature, but there had been mentioned the possession of the freehold house during the life of the wife. Then I say the exception, being of a general nature and applying to everything which had been already mentioned in favour of others, has this effect, that, by the words, "whatever I may die possessed of," he considered he should have passed everything that had been given to others, unless he had made the exception; that is to say, in other words, that, by making the exception, he has marked the extent and operation which, in his own mind, he thought his own phrases would have had on his own property. Therefore, you have not only the general plain meaning of the words, unincumbered by any legal form, "whatever I may die possessed of," but you have the matter reduced to a certainty, by the very nature of the exception which the testator has made. And it was with reference to that, when I looked at the case of *Thomas* v. *Phelps*, that I was struck with the observation of Sir *John Leach*. His *Honor* says: "The exception of the household furniture, is of little weight here." It might be of very little weight in the case of *Thomas* v. *Phelps*; but it is of very great weight in this case; because it appears to me to put it beyond doubt that the testator was speaking with respect to estates of inheritance, as well as with respect to mere interests of a personal nature.

Then the testator says: "I give and bequeath the small sum of 50*l.* to my much-esteemed friend, *John Eden*, esq., attorney at law, in *Liverpool*. To *Betty Moffit* I give and bequeath the sum of 18*l.* per annum for her natural life. This is done as a small token of

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friendship for her long and important services in my family. That the intention of this my will may be carried into execution, I appoint my wife my executrix, and *John Eden*, esq., and my son, *Thomas Coltman*, executors. As for the houses in *Liverpool*, they may dispose of any one or other of them, whenever the same may be thought advisable for the benefit of the parties concerned; but the house in *Chester* must not be sold so long as my wife lives." Now, I do not enter into the question whether the testator has given a power of sale or not; but it is pretty plain to me that he had something floating in his mind as to a power to be executed by the executors, as I should presume, for the purpose of division. But my observation upon it is that, if he has, in a preceding part of his will, clearly given to the children, at the decease of his wife, all that was not before given to others, the circumstance that there may be a doubt as to what he meant the executors should do, or as to what he supposed the executors had by way of power, cannot have the effect of cutting down what is perfectly plain. If there is a clear devise, that clear devise must operate, unless there be some specific devise equally clear to cut it down. And it is impossible to say, by any construction of these loose words at the end, that they have the effect of destroying that which, according to my apprehension, was given in clear terms to the wife.

I do not think that any difficulty arises from the circumstance that, on the face of the will, there is an intestacy in part. It is only the house in *Stanley-place* which is given to the wife for life; but, when he has given everything to his daughters at the decease of his wife, he has left, as a matter of course, to descend to his heir until the death of his wife, all those tenements

the reversion of which, after the death of his wife, is given to the daughters.

I must say that, from the time when I first read this will to the present moment, I have never had the least doubt upon the construction of it; and therefore I cannot think it right to send the case to another court of law.

Will. Construction. Case sent to Law.

Testator, amongst other bequests, gave a freehold house, his furniture and certain other chattels, to his wife for life, and willed, that, at her death, his two daughters should divide equally, as *residuary legatees, whatever he might die possessed of, except what was already mentioned in favour of others.* The question was, what was the effect of the words in *italics*, with regard to certain real estates of the testator, which were not particularly mentioned in his will. Held that the Court ought not, in order to determine that question, to inquire into the value and other circumstances of the real estates, nor ought those circumstances to be stated in a case made for the opinion of a Court of Law upon the question.

Although the foregoing part of this report relates to the will of *George Coltman*, the suit was not instituted upon his will, but upon the will of his brother, *Thomas*; and the case was submitted to the Barons of the Exchequer, in order to enable the Court of Chancery to determine as to the rights of the parties to the property of *Thomas*, which *George* became entitled to on his death.

Thomas Coltman, by his will dated the 10th of October 1821, gave all his messuages, lands, &c. situate in *Little Hale*, in the county of *Lincoln*, to his brother, *George Coltman*, and his (*George*'s) sons, *Thomas* and *George*, and their heirs, to the use of the person or persons who, at the death of *Elizabeth Walker*, late of , was the heir or co-heirs of the said *Elizabeth Walker*, and the heirs and assigns of the same person or persons respectively; and he directed the trustees to publish advertisements, in certain newspapers, for discovering the heir or co-heirs of *Elizabeth Walker*; and, in the event of no such heir or co-heirs

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being clearly and satisfactorily discovered before the end of twelve calendar months next after his death, then he directed that the trustees should, at such times and in such manner as to them should seem meet, and without any concurrence or assent of his heir or heirs at law, sell and dispose of the last-mentioned hereditaments and premises, and stand possessed of the monies to arise from the sale thereof, and from the rents and profits thereof in the meantime, upon the trusts thereinafter declared concerning the same. The testator then gave certain annuities and charged them on his messuages, lands, &c. situate in *Great Hale*, in the county of *Lincoln*; and he devised those messuages, lands, &c. and also his lands, tenements and hereditaments situate in *Puttenham*, in the county of *Hertford*, to the trustees, in trust to sell the same at such times and in such manner as to them should seem meet, and to stand possessed of the monies to arise from the several sales thereby authorized and directed to be made, or such of the same sales as should take effect, and also from the rents and profits of the premises in the meantime, upon trust, after retaining the expenses incident to the sale or sales, to pay the surplus of the trust monies to the person or persons who, at the decease of *Sarah Marriott* and *Mary Walker*, the nieces of the said *Elizabeth Walker*, was or were their heirs or co-heirs at law respectively, in equal moieties; and, if there should be co-heirs of each of them, the said *Sarah Marriott* and *Mary Walker*, then upon trust to divide the same moieties of the said residuary trust monies, between them respectively as tenants in common, and in the same shares, equally or unequally, as they would be entitled to a real estate descending from the said *Sarah Marriott* and *Mary Walker* respectively, and vesting in them at their respective deaths by descent as their co-heirs respectively.

The testator died, without issue, on the 11th of October 1826, leaving his brother, *George*, his heir-at-law.

On the 22d of November 1827, *George Coltman* and his sons, *Thomas* and *George*, sold the lands in *Great Hale*, subject to the existing annuities, for 5,690*l.*, and received a deposit of 569*l.*

George Coltman made his will, dated the 26th of March 1828, and died on the 3d of August following, as before mentioned. In January 1829 his two sons filed a bill against *William Barber* and *Mary Lawrence*, the two surviving annuitants under their uncle's will, stating that they were unable to ascertain who were the heirs of *Elizabeth Walker* and her two nieces at their respective deaths, and praying that the trusts of *Thomas Coltman*'s will might be performed under the direction of the Court.

In pursuance of the decree in that suit, inquiries were made, by the *Master*, for the purpose of ascertaining who were the heirs or co-heirs of *Elizabeth Walker* and her two nieces at their respective deaths; the result of which was that no heir of *Elizabeth Walker* could be found, and that the persons who were the heirs of her two nieces at their deaths, were ascertained to have died before the testator, *Thomas Coltman*: and, ultimately the trusts of *Thomas Coltman*'s will were declared to have failed.

Under these circumstances two questions arose in *Davenport* v. *Coltman* (which was in the nature of a supplemental suit to *Coltman* v. *Barber*):

First, whether *Thomas Coltman*'s estates at *Great Hale*, *Little Hale* and *Puttenham* were converted, by

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his will, into personalty out and out, or only for the purpose of executing the trusts of his will; or, in other words, whether *George Coltman* who, as heir to his brother, had become entitled to those estates in consequence of the trusts declared of their produce having failed, took them as real or as personal estate.

Second, if those estates were not converted out and out, by *Thomas Coltman*'s will, whether the proceeds of such parts of them as were sold in the lifetime of *George Coltman*, were to be considered as part of his real or of his personal estate.

But, before those questions were discussed,

Mr. *G. Richards* and Mr. *Lee* contended that a new case, containing all the facts and circumstances above detailed, relating to the *Lincolnshire* and *Hertfordshire* estates, ought to be made for the opinion of the Judges of the Exchequer, or of some other court of law. They referred to what Mr. Justice *Chambre* is reported to have said in *Doe* v. *Yeud* (*c*), namely, that, where the question is whether certain property does or does not pass by a will, the value and other matters relating to it ought to be stated in the case, in order that the Court may judge whether it was likely that the testator had overlooked it or not.

The VICE-CHANCELLOR:

I am of opinion that the matter ought not to be sent back with an altered case: I am not now alluding to my own opinion upon the certificate; but what I mean is that I do not think that it would be right to send a case, altered in the way proposed, for the purpose of again taking the opinion either of the Court of Ex-

(*c*) 2 New Rep. 221.

chequer or any other court of law, upon the effect of the will of *George Coltman*.

I can easily understand that there are cases in which there is a kind of ambiguity; and then you must, for the purpose of solving what is ambiguous, know all the circumstances of the case; that is, the Court must put itself in the possession of all the knowledge which the testator had. But it is quite new to me to hear that, for the purpose of determining the meaning of unambiguous phrases, or for the purpose of determining whether certain words pass a fee simple or give a limited interest, it is necessary to know the amount of the property. When Mr. *Lee* mentioned the case yesterday, I was very much struck with his stating the language which was put into the mouth of, and probably fell from Mr. Justice *Chambre*; that is to say, so far as it is stated as a general proposition.

I can easily understand, when a question is made about what is the meaning of a set of words which, together, form a residuary bequest, that there may be circumstances appearing, on the face of the will, which may make it necessary to know something more about the matter than appears on the face of the will. But, if a court of law or a court of equity were to require to be minutely informed of the amount and value and situation and position of every item which composed a testator's property, in order to indulge itself in the not very narrow field of conjecture what it was likely that the testator would have done in respect of all and every his legatees, if, at the time he made his will, he had had a full and clear comprehension of the nature, value, extent and circumstances of the different items of his property, my opinion is that the consequence

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would be that the settled rules of construction would be departed from.

In my opinion the will itself presents no ambiguity. The only question is, has it passed such real estate as the testator, *George Coltman*, happened to have? That is the point: and, though it may be perfectly true that, with respect to something which was apparently real estate, a question may be raised whether it ought to be considered as real estate or not, *that* is a question which arises after the determination of the question whether the real estate would have passed by the will *simpliciter*. If a question is raised whether a certain portion of property be real estate or not, that question must be determined. But no such question arises under *George Coltman*'s will; and my opinion is that I should be making a very bad precedent, if I were to direct that the case should be remodelled, in order that those circumstances to which Mr. *Richards* and Mr. *Lee* have referred, might be added to it.

Will. Conversion. Construction.

Mr. *Bethell* and Mr. *Willcock* for the Plaintiff, Mrs. *Davenport*, said that, by *Thomas Coltman*'s will, the

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Testator devised his real estates to trustees in trust to sell, and to pay the proceeds to the person or persons who, at the decease of *S. M.* and *M. W.*, was or were their heirs or co-heirs at law respectively, in equal moieties. One of the trustees was the testator's heir; and he and his co-trustees sold part of the estates shortly after the testator's death. The heir then died; and, after his death, it appeared that the persons who were the heirs of *S. M.* and *M. W.* at their respective deaths, had died in the testator's lifetime; and consequently the trusts declared in their favour, failed. Held that the testator's real estates were not absolutely converted, by his will, into personalty, but only for the purpose expressed therein, and, that purpose having failed, that they descended to his heir. Held also that the proceeds of that part of the estate which had been sold by the testator's heir and his co-trustees, was sold under an erroneous impression that one or more of the intended *cestui que trusts* might be in existence, and, consequently, that those proceeds also must be considered as part of the real estates of the heir.

estates at *Great Hale* and *Puttenham*, and the estates at *Little Hale* in the event of no heir of *Elizabeth Walker* being discovered within twelve calendar months after the testator's death, were directed to be sold out and out; and that the sale was not to be deferred until after the heirs of *Sarah Marriott* and *Mary Walker* had been discovered, but was to take place in all events; and, if they were discovered, the proceeds were to be divided amongst them; and, consequently, those estates were indelibly stamped with the character of personalty, and devolved, as such, to *George Coltman*, the father.

Mr. *G. Richards* and Mr. *Lee* for *Thomas Coltman*, the son and heir of *George Coltman*, said that *Thomas Coltman*, the testator, had directed his estates to be sold, not absolutely and in all events, but only for the purpose of the proceeds being divided amongst the heirs of *Sarah Marriott* and *Mary Walker* living at their deaths; and, as those heirs had died in the lifetime of *Thomas Coltman*, the testator, the purpose for which the estates were directed to be sold, had failed, and, therefore, the estates retained their original quality; and that quality was not altered by the contract which *George Coltman*, the father, had entered into for the sale of part of the estates; inasmuch as he had entered into that contract under the impression, which afterwards proved to be erroneous, that the objects of the trusts declared by his brother's will, were in existence, and with a view, solely to the performance of those trusts; and consequently that the proceeds of that part of the estates which had been sold, as well as the parts remaining unsold, were to be considered as part of the real estate of *George Coltman*, the father; and *Thomas Coltman*, his son and heir, was entitled to the income of them during the life of *Mary Coltman*, the widow of *George Coltman*,

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the father: that the law applicable to the present case, was correctly laid down, by Sir *John Leach*, V. C. in *Smith* v. *Claxton* (*d*): "Where a devisor directs his land to be sold and the produce divided between *A.* and *B.*, the obvious purpose of the testator is that there shall be a sale for the convenience of division; and *A.* and *B.* take their several interests as money and not land. But, in the case put, let it be supposed that *A.* and *B.* both die in the lifetime of the devisor, and the whole interest in the land descends to the heir, the question would then be whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being that there should be a sale for the convenience of division between the devisees, that purpose could have no application to a case in which the devisees wholly failed, and the heir would, therefore, take the whole interest as land."

Mr. *Koe*, for *Francis George Newbold*, the son and heir of *Mary Newbold*, also contended that the estates in question descended to *George Coltman*, the father, as real estate, and passed, as such, by his will, to his two daughters, subject to the right of *Thomas Coltman*, his son and heir, to receive the rents during the life of *Mary Coltman*, the widow.

Mr. *Parker* and Mr. *Mylne*, for *Mary Coltman*, the widow, insisted that the whole of the estates was converted, out and out, into personalty, by the will of *Thomas Coltman*, or, at all events, that such parts of them as had been sold by *George Coltman*, the father, were, thereby, so converted, and formed part of his personal

(*d*) 4 Madd. 484; *see* 492.

estate to which *Mary Coltman* was entitled for her life.

Mr. *K. Parker*, Mr. *Lonsdale* and Mr. *Briggs* appeared for the other parties.

The VICE-CHANCELLOR:

The principal question is whether, in the events that happened, the estates in *Little Hale*, *Great Hale* and *Puttenham*, were, upon the death of *Thomas Coltman*, to be taken as the real estate of *George* or not.

I am not aware that Sir *John Leach*'s decision in *Smith* v. *Claxton* has ever been reversed; and, in my opinion, there is the strongest ground for upholding it.

If the estates in question ceased to bear the character of real estates, it can only be because there was a subsisting, (that is to say) an enforcible trust for sale. Suppose that, upon the death of *Thomas Coltman*, this state of things had happened, namely, that the two co-trustees had filed their bill against *George*, and had said: "Here is a trust for sale, and the estate shall be sold to answer the purposes of the will:" would not the Court, first of all, have said: "Let us see if there is any ground for selling the estates; let us inquire, in the first instance, whether any heir of *Elizabeth Walker* is in existence, and, if not, whether the heirs of the two other ladies, or the heir of either of them is in existence:" and, suppose that it had turned out, satisfactorily, on the *Master*'s report, that there was no person to whom, by any possibility, a payment could be made of the monies to arise from the sale of the three estates: would the Court have directed them to be sold? It is perfectly evident to me that there was no other object whatever in directing the estates to be sold, except for the purpose of dividing the produce amongst those persons, with respect

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to whom it was most probable that there would be more than one, although it was possible that there might be only one. Then, if there was no enforcible trust for sale, as in that case there could not be, this case is precisely the same as if the testator had suffered his estates to descend, except only that the law would consider the legal estate to be vested in those persons to whom it is given in express words. The consequence of which would be, that the heir at law of the testator and his two co-devisees would, in a court of equity, be held to be trustees for the heir at law.

Then, with respect to any dealing with the estates which took place after the death of the testator, I mean that sale which took effect by virtue of the contract entered into in November 1827, I am of opinion that it ought to be considered as not at all interfering with the right of *George* or of those who claim under him in his character of heir at law. I have not seen the particular contract; but it is quite plain that there was a sort of family notion that there was a trust to be executed: and the contract was not made with *George* alone, but with him and his two sons, one of whom was an infant at the time; and the very fact that any other person was joined with *George* in the contract, goes to show that it was a contract made, not because *George* was dealing with that which he considered to be his own real estate, but because he apprehended that he was under an obligation to perform a trust.

If the parties wish that matter to be fully inquired into, I will direct it to be inquired into; but if not, I shall declare that all the estates were the real estate of *George*, and are to be taken, as such, by the parties who claim under him.

BROWN *v.* BAMFORD.

1842: 27th May.

THIS case, which was heard on this day, is reported *ante*, vol. xi. page 127. An appeal, from the *Vice-Chancellor*'s decision, to the *Lord Chancellor*, has been argued; but his Lordship has not yet delivered his judgment*.

* See *Moore* v. *Moore*, and *Baggett* v. *Meux*, reported by Mr. *Collyer*, vol. i. pages 54 and 138.

MORRICE *v.* LANGHAM.

THE decree in this cause (which is reported *ante*, vol. xi. page 260) was, as the Reporter has been informed by one of the Counsel engaged in the appeal, affirmed, *in substance*, by the House of Lords on the 5th of September 1844; the appeal having been dismissed with costs, so far as the rents of the copyhold estates were concerned; and having been reversed, so far as the rents of the freeholds were concerned, on the ground *only* that it was irregular in giving relief between co-defendants.

1842:
27th May
and
6th June.

DUNCAN *v.* CAMPBELL.

Husband and Wife. Construction. Deed. Settlement.

Mrs. *D.* being entitled to 3,000 *l.* in reversion expectant on her aunt's death, the aunt consented, at the request of Mr. and Mrs. *D.*, to relinquish her life interest in 2,000 *l.*, part of the 3,000 *l.*, in consideration of Mr. *D.* agreeing that the remainder of the 3,000 *l*, when payable, should be paid to trustees for his wife's separate use, and that he would, immediately, settle 2,000 *l.* out of his own funds, and also the first-mentioned 2,000 *l.*, so as to provide *for the maintenance of himself and his wife*, and the survivor of them. The agreement was carried into effect by a deed which directed the trustees to pay the interest of the two sums of 2,000 *l. to Mr. and Mrs. D. during their joint lives*, and to stand possessed of the principal for the survivor of them. Mr. *D.* afterwards separated from his wife in consequence of her having committed adultery. Held that he was entitled to receive the whole of the interest of the trust fund; and was not bound to maintain his wife out of it, notwithstanding she was destitute of the means of support.

THE bill stated that *Margaret Campbell*, formerly of *Culreath*, in *Scotland*, spinster, deceased, and her sister, *Marion Campbell*, of the same place, spinster, deceased, mutually and reciprocally executed two trust deeds or settlements, dated respectively the 31st of March 1828, by one of which, reserving a life interest in themselves and the survivor of them therein, they gave and disposed of all their lands and heritages, heritable bonds, heritable debts, and, in general, their whole heritable means and estate, to certain trustees, upon trust, among other things, to raise and pay to the Defendant, *Helen Hodges* or *Duncan*, (their niece and the wife of the Plaintiff,) the sum of 3,000 *l.* at the first term of Whitsunday or Martinmas that should happen six months after the death of the survivor of them the said *Margaret Campbell* and *Marion Campbell*, with interest

Scotch Deed.—Foreign Deed.—Construction.

A deed in the *Scotch* form, made between parties, some of whom were domiciled in *Scotland*, and the others in *England*, construed, partly according to the law of *Scotland*, and partly according to the law of *England*; that is to say, so far as it concerned the *Scotch* parties, according to the *Scotch* law, and so far as it concerned the *English* parties, according to the *English* law.

thereafter till paid; and provided and declared that it should not be in the power of the survivor of them, the said *Margaret* and *Marion Campbell*, to alter or revoke the said trust-deed and settlement, or to diminish any of the special legacies therein mentioned; but that such survivor should have the power to grant further new or additional legacies and bequests affecting the residue of their the said *Margaret Campbell* and *Marion Campbell*'s means and estate only; and, subject to such power, they thereby disposed of the residue in manner in the said trust-deed mentioned: and, by the other of which trust-deeds, they directed that the residue of their personal estate should, after payment thereout of, amongst other things, such legacies as they or the survivor of them should by deed or writing thereafter direct or bequeath, form part of and be divisible along with the proceeds of their real estate. The bill next stated that *Margaret Campbell* and *Marion Campbell*, executed a codicil or deed of appointment founded on the said trust-deed, and dated the 29th of January 1829, whereby they revoked the disposition of the residue of their estates made by the trust-deed and settlement, and directed that such residue should devolve on their nearest heirs upon the death of the survivor of them: that *Margaret Campbell* died on the 30th of January 1829, and, thereupon, *Marion Campbell* became entitled to exercise the power over the residuary funds given to her by the aforesaid settlements; and, by a deed of settlement dated the 16th of July 1832, she, in exercise of such power, gave, amongst other things, the sum of 1,000 *l.* sterling to the said *Helen Hodges* or *Duncan*, if there should be sufficient to discharge the same from the said residuary funds: that the deeds before mentioned were executed in *Scotland*, and registered in the books of the Council and Session: that the Plaintiff and *Helen Duncan*, his wife, entered into an arrangement in concurrence

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with *Marion Campbell*, who consented for that purpose to give up her life interest in 2,000 *l.* part of the sum of 3,000 *l.* provided for *Helen Duncan* by the aforesaid deed or settlement, for setting apart a sum of 2,000 *l.* of the Plaintiff's own money, together with the 2,000 *l.* part of the 3,000 *l.* to provide the Plaintiff for his life, with an annual income for the maintenance of the Plaintiff and his wife, *Helen Duncan*, who were then residing together, and to make a like provision for the survivor of the Plaintiff and his wife*; and, in pursuance of that arrangement, the Plaintiff and his wife, and *Marion Campbell*, on the 16th of October 1833, made and executed an agreement or contract in the *Scotch* form, which was as follows: "It is contracted, agreed and ended, by and between Miss *Marion Campbell*, of *Culreath*, on the one part, and Mrs. *Helen Hodges* or *Duncan*, spouse of *John G. Duncan, residing at Alton, Hampshire*, with the special advice and consent of the said *John G. Duncan*, her husband, and the said *John G. Duncan*, for himself and his interest, and as taking burden on him for his said spouse, on the other part, in manner and to the effect following: whereas the said Miss *Marion Campbell*, and the now deceased *Margaret Campbell*, her sister, by a certain deed of settlement executed by them, provided said Mrs. *Helen Hodges* or *Duncan* in a legacy of 3,000 *l.* sterling, payable at the first term of Whitsunday or Martinmas that should happen six months after the death of the survivor of them the said *Margaret Campbell* and *Marion Campbell*; and said *John G. Duncan* and Mrs. *Helen Hodges* or *Duncan*, having now applied to said Miss *Marion Campbell* for immediate payment of 2,000 *l.* of said legacy, in order to enable them to make permanent pro-

* The above statement of the case, was copied, correctly, from the brief.

visions *for the maintenance of themselves* and the survivor of them, by sinking said sum of 2,000 *l.* along with a similar sum of 2,000 *l.* of his, said *John G. Duncan*'s, own funds, on an annuity or yearly or half-yearly payment on their joint lives and the life of the survivor of them, *or by investing same in the Government or other public security or securities* in the names of trustees for behoof of them, said *John G. Duncan* and Mrs. *Helen Hodges* or *Duncan*, so that the interest or dividends *shall be paid to them during their joint lives*, and the principal sum to be at the disposal of the survivor, he said *John G. Duncan*, at same time and in consideration of such immediate payment, being willing to consent and agree that the remaining 1,000 *l.* of said legacy, when payable, shall be paid over to trustees for behoof of said Mrs. *Helen Hodges* or *Duncan*, for her own use exclusively; and said Miss *Marion Campbell* having, in consideration of the circumstances and situations of said spouses and on these conditions, agreed to the proposition of said *John G. Duncan* and Mrs. *Helen Hodges* or *Duncan*, and, in consequence, made payment to them of said sum of 2,000 *l.* sterling, of which they hereby grant the receipt, renouncing all exceptions in the contrary, and discharge said Miss *Marion Campbell* and all others the heirs and successors of said deceased *Margaret Campbell*, of the aforesaid legacy to the extent of said sum of 2,000 *l.* sterling now paid as aforesaid: and further, and in consideration of the immediate advance of said sum of 2,000 *l.*, said Mrs. *Helen Hodges* or *Duncan*, with consent of said *John G. Duncan*, and said *John G. Duncan*, for himself and his interest, hereby assign, convey and make over to and in favour of *John Deans*, Esq., of *Albany Terrace, Regent's Park*, in the county of *Middlesex*, *William Archibald Henry Fowlds*, of *Shweeland, Ayrshire*, and *James Morton*,

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writer in *Ayr*, and the survivors and survivors of them, as trustees for the use and behoof of said Mrs. *Helen Hodges* or *Duncan*, herself, her heirs and assignees, the remaining 1,000*l.* of said legacy of 3,000*l.* sterling, with full power to them to receive and discharge the same when it becomes payable, surrogating and substituting the said trustees and the survivors or survivor of them in trust as aforesaid in the full right and place of the premises; the said *John G. Duncan* hereby renouncing his *jus mariti*, in so far as regards the said sum of 1,000*l.* sterling, now and in all times coming; and further, and in terms of the aforesaid agreement, said *John G. Duncan* hereby binds and obliges himself, at the sight of said *John Deans*, immediately to invest said sum of 2,000*l.* so paid by said Miss *Marion Campbell*, alongst with a like sum of 2,000*l.* of his own funds, for an annuity or yearly or half-yearly payment, during the joint lives of himself and said Mrs. *Helen Hodges* or *Duncan* and the survivor of them, either by sinking same by way of annuity as aforesaid, or by investing said sums *in the Government or other public security or securities* in manner hereinbefore mentioned, or in such other way or manner as may be sanctioned and approved by said *John Deans*, taking all due care that same shall be safely invested as to secure the punctual payment of said annuity, or the interest or dividends arising on said securities: *and the parties consent to the registration hereof in the books of the Council and Session*, therein to remain for preservation, and that letters of horning on six days charge, and all other necessary execution may pass herein in form as appears; and, for that purpose they constitute procurators. In witness whereof these presents, written on this and the preceding page of stamped, by *Thomas Deans*, of *College-street*, in the city of *Westminster*,

Parliamentary solicitor for said *James Morton*, writer in *Ayr*, are subscribed by the parties as follows, viz., by the said Mrs. *Hodges* or *Duncan*, and *John G. Duncan*, at *Albany Terrace, Regent's Park, in the county of Middlesex* aforesaid, the 16th day of October in the year 1833, before these witnesses, the said *Thomas Deans* and *William Ashworth*, of *Albany-street, Regent's Park*, aforesaid, and by the said Miss *Marion Campbell* at on the day of and year aforesaid, before these witnesses.*"

The bill then stated that the last-mentioned deed was duly registered in the books of the Council and Session; and that it *was executed by Marion Campbell in Scotland, and by the Plaintiff and his wife in England, where they were then domiciled*: that the two sums of 2,000 *l.* each were paid to *John Deans* (who afterwards took the name of *Campbell*), as one of the trustees of the contract or settlement of the 16th of October 1833; and he afterwards invested those sums in the purchase of 32,200 sicca rupees of the *East India* Company's *Bengal* six per cent. remittable loan: that the 32,200 sicca rupees were afterwards, at the request of the Plaintiff and his wife, transferred, by *John Deans Campbell*, into the joint names of himself and of *Charles Trimmer* of *Alton* in *Hampshire*, as trustees thereof; and the Plaintiff received the interest thereon up to the 31st of December 1835: that the 32,200 sicca rupees were paid off by the *East India* Company in January 1836; and the sum paid by the Company was invested and still remained invested in Exchequer bills, in the names of the trustees: that *Marion Campbell*, by a codicil,

* The above deed was correctly copied from the brief, blanks being left as in the text.

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dated the 23d of June 1834, revoked the legacy of 1,000 *l.* given to *Helen Duncan*, and, in lieu thereof, gave her a legacy of 500 *l.* for her separate use: that *Marion Campbell* died on the 12th of July 1834: *that, in consequence of the adultery of Helen Duncan, the Plaintiff was under the necessity of living apart from her and instituting a suit in the Consistory Court of the Bishop of London, and, on the 27th of July* 1836, *he obtained a decree, in that suit, for a divorce a mensa et thoro*: that the 1,000 *l.*, the residue of the 3,000 *l.*, had been or might be received by *Helen Duncan*, or by *John Deans Campbell* and the other trustees of the contract of the 16th of October 1833, in trust for her separate use; and that the additional legacy of 500 *l.* had been received by her and applied to her own separate use: that the Plaintiff had requested *John Deans Campbell* and *Charles Trimmer* to pay to him the interest which had accrued on the Exchequer bills, and to invest the principal in the three per cent. consols: but that *Campbell* had refused, although *Trimmer* was willing, to comply with his request: that *Campbell* pretended that the Plaintiff was not entitled to the interest of the 4,000 *l.*; but that *Helen Duncan* was entitled to receive a moiety of such interest during the joint lives of her and the Plaintiff, and *Campbell* had paid her 83 *l.* 17 *s.* 10 *d.* in part of such interest; but the Plaintiff charged that he was entitled to the whole of the interest of the 4,000 *l.* during his life: that he purchased the interest of his wife in the 2,000 *l.*, part of the 3,000 *l.*, by releasing, in her favour, all his right and title in and to the 1,000 *l.*, the residue of the 3,000 *l.*, and that he was not bound to make any further provision for her, inasmuch as she was entitled to the 1,000 *l.* and 500 *l.* for her separate use; but, nevertheless, she alleged that the contract of the 16th

of October 1833, *ought to be construed according to the law of Scotland*, and claimed to be entitled to a moiety of the income of the 4,000 *l.*; but the Plaintiff charged that the contract *ought to be construed according to the law of England*, and that, according to the true construction of it, the Plaintiff was solely entitled to the income of the 4,000 *l.* during his life; and that if his wife was, under the contract, entitled to participate in the income of the 4,000 *l.*, it was only during her cohabitation with the Plaintiff, or in case of any separation arising from his illegal conduct; and that, by her misconduct and separation consequent thereupon, she had forfeited such right of participation.

The bill prayed that it might be declared that the contract of the 16th of October 1833, ought to be construed according to the law of *England*, and that the 4,000 *l.* ought to be invested either in the three per cents. or in the purchase of an annuity for the lives of the Plaintiff and his wife and the survivor of them; and that, under the circumstances before stated, the Plaintiff was entitled to receive the dividends and interest of the trust-fund, or the annuity so to be purchased, during his life; and that *Campbell* and *Trimmer* might be directed to invest the 4,000 *l.* accordingly; and to pay, to the Plaintiff, the income during his life, and also the arrears of interest on the 4,000 *l.*

The Defendant, *John Deans Campbell*, in his answer, said that the contract of the 16th of October 1833, was executed in *Scotland*; and he submitted that, regard being had to its contents, even supposing that it had been executed in *England*, the parties thereto had thereby contracted that their rights and interests created

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or affected thereby, should be regulated by the law of *Scotland*: that, in August 1835, the Plaintiff sent his wife from his house, without making any provision for her support; and that she had a child born in the December following; and that, as she was without the means of support for herself or her child, the Defendant had paid her the 83*l.* 17*s.* 10*d.* and other sums amounting, altogether, to upwards of 544*l.*: that, according to the law of *Scotland*, *Helen Duncan*, under the terms of the contract, would be entitled to a moiety of the income of the funds included therein, and that, by the same law, he, the Defendant, would not, regard being had to the true construction of the contract, be legally discharged in respect to paying such income, unless he paid the same upon a receipt signed by the Plaintiff and his wife jointly: that he had been advised and believed that, according to the law of *Scotland*, if the contract of the 16th of October 1833, was adjudged and acted upon in a *Scotch* Court of Justice, *Helen Duncan* would be held entitled to a moiety of the income of the trust fund.

Helen Duncan, in her answer, said that she had received the legacy of 500*l.*; but that the 1,000*l.*, the residue of the 3,000*l.*, had not been paid to the trustees of the contract: that the Plaintiff had refused to make any allowance for the support and maintenance of her and her child; and that, ever since the decree of divorce, she had been and still was wholly destitute of the means of support. In other respects, her answer was to the same effect as the answer of the Defendant *Campbell*.

The cause now came on to be heard.

Mr. *Bethell* and Mr. *Willcock*, for the Plaintiff:

We contend that the instrument of the 16th of October 1833, though in the *Scotch* form, ought to be construed and carried into effect according to the law of *England*; and then the Plaintiff, having been discharged, by the misconduct of his wife, from the obligation of maintaining her, will be entitled to have the whole income of the trust-fund paid to him by the trustees. If however the Court should decide that this instrument ought to be construed according to the law of *Scotland*, the *Master* must be directed to inquire and state what is the law of *Scotland* upon the subject.

It is true that Miss *Marion Campbell* was domiciled in *Scotland*, and that she executed the instrument in that country: but the Plaintiff and his wife and one of the trustees, Mr. *Deans Campbell*, were resident in *England*; and executed the instrument there. It is immaterial to inquire from whence the money came; but it is very material to see where it was to be dealt with; where it was to produce income, and who were to be the recipients of it. It was to be paid to three gentlemen, one of whom was resident in *England*, and it was to be invested either in the purchase of an annuity, or in the Government or other public securities, or in such other manner as Mr. *Campbell*, the trustee resident in *England*, should sanction or approve of; and the income of the fund when so invested, was to be paid to Mr. and Mrs. *Duncan*, who were domiciled and resident in *England*. The instrument was *Scotch* both in form and anguage; but it ought not, on that account, to be construed according to the *Scotch* law, any more than, if it had been in the Latin language, it ought to be construed according to the Roman law. There is not only a *lex loci celebrationis contractus*, but also a *lex loci solutionis*

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contractus. If the question is whether the contract was duly executed or properly stamped, that question must be determined by the *lex loci celebrationis*; but if the question is what *effect* ought to be given to the contract, then regard must be had to the *lex loci solutionis*; that is, to the law of the place of performance. Here the parties to the contract, refer, throughout, to *England* as the place of performance. Mr. *Duncan* was the principal party to the contract. The consideration for it moved from him. The fund, which was the subject of it, was to be invested in *English* securities. The principal trustee, Mr. *Campbell*, who was to sanction the investment, was resident in *England*; and the parties for whose benefit the contract was entered into and the investment was to be made, were, both of them, domiciled and resident in *England*. It will be said, perhaps, by the counsel for the Defendants, that it is the *lex loci contractus*, which must be regarded in this case: but where a contract is executed by some of the parties in one country, and by the other parties in another country, there is no *lex loci contractus*: in such a case, the only law that can apply to it, is the *lex loci solutionis*. In *Stanley* v. *Bernes* (*a*), the Court of Delegates decided that a will made by a *British* subject who was domiciled in the *Portuguese* dominions, though it was *English* both in form and in language, must be construed, not according to the law of *England*, but according to the law of the country where the testator was domiciled *. The decisions in *Price* v. *Dewhurst* (*b*) and *Anstruther* v. *Chalmer* (*c*) proceeded on the same principle. In *Don* v.

(*a*) 3 Hag. Eccl. Rep. 373. (*b*) *Ante*, Vol. VIII. p. 279.
(*c*) *Ante*, Vol. II. p. 1.

* The question in *Stanley* v. *Bernes*, seems to have related to the *execution* and not the *construction* of the testamentary instrument.

Lippmann (*d*) the House of Lords decided that the law of the country in which a contract is to be performed, must decide as to the effect which is to be given to it. Their Lordships there followed the maxim (which is equally applicable to the present case): "*Actor sequitur forum rei.*" The law upon the point now in discussion, is correctly stated, by Dr. *Story*, as follows (*e*): "The rules already considered, suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But, where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice; and the Roman law has (as we have seen) adopted it as a maxim; *contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit.* And again, in the law, *Aut ubi quis contraxerit. Contractum autem non utique eo loco intelligitur, quo negotium gestum sit; sed quo solvenda est pecunia?*"

Mr. *Willcock:*

In order to arrive at a proper conclusion as to the effect which ought to be given to the contract in question, we must have regard to the position in which the parties stood, with respect to each other, at the time when that contract was entered into. At that time the sum of 3,000*l.* was irrevocably settled on Mrs. *Duncan.* Miss *Marion Campbell* had no interest in the capital of that sum; she had only a life-interest in it; and, on her

(*d*) 5 Clark & Finn. 1; *see* 13.
(*e*) Conflict of Laws, 233, 1st edit.

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death, Mr. *Duncan* would be entitled to it in right of his wife. Such being the interests of the parties, Mr. *Duncan* agreed to release his right to 1,000 *l.*, part of the 3,000 *l.*, in consideration of Miss *Marion Campbell* relinquishing her life-interest in 2,000 *l.*, the remainder of the 3,000 *l.* Mr. *Duncan*, therefore, independently of his advancing 2,000 *l.* out of his own funds, became a purchaser of the 2,000 *l.*; and Miss *Marion Campbell* had nothing whatever to do with the other parts of the contract. As to them, she was an assenting, but not a contracting party. The instrument recites that the object of the application to her, was to enable Mr. and Mrs. *Duncan* to make provision *for the maintenance of themselves*, by investing the two sums of 2,000 *l.* in a certain manner and upon certain trusts, for their own, exclusive benefit, which they had previously agreed upon between themselves. Miss *Marion Campbell*, therefore, had nothing to do with the special terms of the contract: those terms were arranged between Mr. and Mrs. *Duncan*, both of whom were resident in *England*; and those terms were to be carried into effect under the sanction of Mr. *Campbell*, who also was resident in *England*. Therefore, it is the law of *England* which must regulate the performance of the contract, as between those parties. Mr. *Burge*, in his Commentaries on Colonial and Foreign Laws, treats of the cases in which a contract is to be performed in some other place than that in which it was made; and then states the rule which prevails in such cases, to be as follows: "The place of performance is then, *fictione juris*, the *locus contractus*; and the general rule is that: *Ratione effectus et complementi ipsius contractus, spectatur ille locus, in quem destinata est solutio; id quod ad modum, mensuram, usuras &c. negligentiam et moram post contractum initum accedentem referendum est.*" The learned author then adds: "This rule is

adopted by jurists and is recognised in *England, Scotland,* and the *United States*" (*f*).

Ball v. *Montgomery* (*g*) is the strongest case that can be found against the present Plaintiff: but it is different from the present case, in many important particulars. There the fund which was the subject of the suit, was the property of the wife. Here, it is the property of the husband; for he purchased it by relinquishing his right to the 1,000*l.* part of the 3,000*l.*, and by settling 2,000*l.* of his own monies. There no trust was declared of the dividends of the stock during the coverture; but here a trust is declared of the income of the fund during the coverture. There the husband was forced to buy the interference of the Court, by doing that which the Court considered it incumbent on him to do; but the Plaintiff in this case has already bought the interference of the Court; for he has made a provision for his wife, not only by the settlement, but also by consenting to the 1,000*l.* being paid to trustees for her separate use. We submit, therefore, that *Ball* v. *Montgomery* is not a case which ought to influence your *Honor's* decision in the present case.

Mr. *Hull,* for the Defendant *Campbell,* said that the parties to the contract of October 1833, had expressly stipulated that the income of the 4,000*l.* should be applied for the joint maintenance of Mr. and Mrs. *Duncan,* and, therefore, Mr. *Campbell* was justified in paying, as he had done, a portion of the income to Mrs. *Duncan,* who, otherwise, would have been wholly without the means of supporting herself and her child.

(*f*) Vol. iii. p. 771.
(*g*) 4 Bro. C. C. 339; and 2 Ves. jun. 191.

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Mr. *Austen* appeared for the other trustee, Mr. *Trimmer*.

Mr. *G. Richards* and Mr. *Roupell*, for Mrs. *Duncan*:

The contract of October 1833 was made not between Mr. *Duncan* and his wife, but between Mr. *Duncan* and Miss *Marion Campbell*, the aunt of Mrs. *Duncan*. At that time, Mrs. *Duncan* was under coverture, and, therefore, incapable of entering into any contract. By the instrument of 1833, Miss *Campbell* gave up her own life-interest in part of the 3,000*l.*, in consideration that the income should be applied for the joint maintenance of Mr. and Mrs. *Duncan*: consequently her intention will be defeated, if the Court grants the prayer of the bill.

Next, we submit that the instrument under consideration, must be construed according to the law of *Scotland*. Miss *M. Campbell* was the most important party to it; for, without her assent, it could have availed nothing. She was domiciled in *Scotland*, and executed the instrument in that country. The form as well as the language of it, is *Scotch*; and it was to be registered in the books of the Council and Session. That stipulation would have been perfectly useless, if the parties had not intended that the construction of the document should be regulated by the law of *Scotland*. What did the parties intend by the expression, '*jus mariti*,' but the marital right according to the law of *Scotland*? The 4,000*l.* was to be invested, not in Government securities alone, but in Government or other public security or securities, so that public securities in *Scotland* as well as in *England*, were in the contemplation of the parties. It is true that the fund is now

invested in *English* securities; but that circumstance does not authorize the Court to deal with it according to the law of *England*. In *Anstruther* v. *Adair* (*h*) the fund in dispute was stock in the *English* funds; but, as the contract respecting it, which it was the object of the suit to enforce, was made between parties who were domiciled in *Scotland*, and in a form known to the law of that country, the Court gave it the same construction and effect as the law of *Scotland* would have given it.

The cases of *Stanley* v. *Bernes* and *Don* v. *Lippmann*, which were cited for the Plaintiff, have no bearing upon the question, whether a contract ought to be *construed* according to the law of one country or another. In the former of those cases the question was whether a testamentary instrument made by a person who was domiciled in a foreign country, ought not to be executed in conformity to the law of that country in order to be a valid disposition of property in *England*; so that the decision in that case, had reference, not to the construction, but to the execution of the instrument. So also in *Don* v. *Lippmann*, the question was not as to the construction of the instrument, but as to the remedy which was applicable to it. In *Melan* v. *Fitzjames* (*i*), Mr. Justice *Heath* made a very clear distinction between the construction which ought to be put, by the Courts of this country, upon an instrument executed abroad, and the mode in which it ought to be enforced. That learned Judge said: "We all agree that, in construing contracts, we must be governed by the laws of the country in which they are made; for all contracts have reference to such laws. But, when we come

(*h*) 2 Myl. & Keen, 513. (*i*) 1 Bos. & Pull. 138.

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to remedies, it is another thing. They must be pursued by the means which the law points out where the party resides. The laws of the country where the contract was made, can only have reference to the nature of the contract, and not to the mode of enforcing it." The same distinction was made and acted upon in *De la Vega* v. *Vianna* (*k*). The decisions in *Potter* v. *Brown* (*l*); *Smith* v. *Mingay* (*m*); *Robinson* v. *Bland* (*n*); and *Lashley* v. *Hog* (*o*), show that the validity of a contract and the effect which ought to be given to it, are points to be decided upon according to the law of the country in which the contract was made.

Supposing, however, that the instrument in question in this case, is to be construed according to the law of *England*, we submit that, according to that law, Mrs. *Duncan* ought to have a portion of the income of the 4,000 *l.*, applied for the maintenance of herself and her child. In *Page* v. *Way* (*p*) the language of the instrument was very similar to the language of the contract in this case. There trustees of real estates were directed to pay and apply the rents for the maintenance and support of a husband, his wife and children. The husband became bankrupt, and his assignees claimed the whole income of the property: but the *Master of the Rolls* said that there could be no doubt of the intention of the settlement, that the wife should be supported out of the property; and he referred it to the *Master* to approve of a proper allowance for the maintenance of her and her children. So, in *Rippon* v. *Norton* (*q*), where property was vested in trustees in trust to apply

(*k*) 1 Barn. & Adol. 284.
(*l*) 5 East, 124.
(*m*) 1 Mau. & Sel. 87.
(*n*) 2 Burr. 1077.
(*o*) Robertson on Personal Succession, 414.
(*p*) 3 Beav. 20.
(*q*) 2 Beav. 63.

the profits, during the life of the settlor's son, for the board, lodging and subsistence of himself and his family; and the son took the benefit of the Insolvent Debtors' Act; the same learned Judge held that the children were entitled to three-fourths of the profits of the property.

Lastly, we submit that, where a married lady is entitled to a provision under a contract, she is not to be deprived of it because she is living in adultery. *Sidney* v. *Sidney* (*r*), and *Blount* v. *Winter* (*s*), fully support that proposition; for, in both those cases, the Court, at the suit of the wife, decreed the husband specifically to perform executory contracts, notwithstanding the wife was living in adultery.

At all events, if the Court will not order a portion of the income of the 4,000*l.* to be applied for the maintenance of Mrs. *Duncan* and her child, it will not act at all. *Carr* v. *Eastabrooke* was very similar to the present case; for the husband had made no provision for his wife, and she had committed adultery; and this Court refused to assist either party. So in *Ball* v. *Montgomery*, the Court, under similar circumstances, refused to give relief to the husband who was the Plaintiff in the cause.

The *Vice-Chancellor*:—In *Ball* v. *Montgomery* the property to which the suit related, was not affected by the settlement on the marriage of the husband and wife: it was left as the *chose in action* of the wife. In *Carr* v. *Eastabrooke* also, the property to which the petitions related was the *chose in action* of the wife.

(*r*) 3 P. W. 269. (*s*) Ibid 276, note (*r*).

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Mr. *Roupell:*

Under the contract of October 1833, the interest of the 4,000*l.*, was to be paid, not to Mr. *Duncan* alone, but to him and Mrs. *Duncan* for their joint maintenance during their lives; and, therefore, according to *Page* v. *Way* and *Rippon* v. *Norton*, the Court will not permit Mr. *Duncan* to receive the whole income of the fund, but will give effect to the declared intention of the parties by directing a portion of the income to be paid to Mrs. *Duncan*; and that too, notwithstanding she has committed adultery: for this Court considers that the circumstance that the wife has been guilty of that crime, does not exempt the husband from his obligation to maintain his wife; and, on that ground, it refused, in *Ball* v. *Montgomery* and *Carr* v. *Eastabrooke*, to assist the husband in asserting his legal right to his wife's property.

The parties plainly intended that the contract, so far at least as it related to the sum contributed by Mrs. *Duncan*'s relations, should take effect and be regulated according to the law of *Scotland*: for, not only is the instrument *Scotch*, both in form and language; but, on the face of it, the parties refer to the process of registration in the books of Council and Session, in order to make it binding on Miss *M. Campbell*. As then the parties referred to the law of *Scotland* for perfecting the instrument, and as Miss *Campbell*, the principal party to it, was domiciled in *Scotland* and executed the instrument there, this Court is bound to give effect to it according to that law; so far at least as the 2,000*l.* contributed by her and her sister (which is the only part of the settled fund which is now in question) is concerned.

The case of *Anstruther* v. *Adair* shows that, if an instrument is in the *Scotch* form, and the principal party

to it is domiciled in *Scotland*, this Court will follow the law of that country in deciding as to the rights of the parties under it, notwithstanding the fund comprised in it is in *England*. In *The Attorney-general* v. *Mill* (*t*), a testator, who was resident in *England*, directed land to be purchased with his residuary estate, and the rents to be distributed amongst indigent persons residing in *Scotland*: and the Court held that the bequest was void under the Statute of Mortmain. That case, therefore, proves that, when the Court has to decide whether the law of *England* or the law of *Scotland* is applicable to an instrument, the country in which the property is to be ultimately distributed, is of no importance.

The VICE-CHANCELLOR:

It is quite possible for an instrument to be of such a nature as that, with respect to one part of it, it is to be dealt with according to one species of law, and, with respect to another part of it, according to a different species of law: and the instrument with respect to which the question in this suit has arisen, appears to me to be of that nature. There is very good reason why it should be considered, to a certain extent, as a *Scotch* instrument: for I collect that the real estate of the two Miss *Campbells*, together with their personal estate, was made the joint fund out of which the 3,000*l.* was to be paid: and, therefore, it was proper that the instrument should be in the *Scotch* form, and that it should be registered in *Scotland* in order to show that the real estate had been discharged by the 3,000*l.* being paid or satisfied. But, in other respects, and as between Mr. and Mrs. *Duncan* and Mr. *J. Deans Campbell* (all of whom were resident in *England*), there is no reason

(*t*) 3 Russ. 328.

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why the instrument should be considered as a *Scotch* one. Miss *M. Campbell*, in her lifetime, did all that it was incumbent on her to do; and, therefore, no person is made a party, to this suit, as representing her. As then the question in the cause arises between Mr. and Mrs. *Duncan*, both of whom are domiciled in *England*, my opinion is that the instrument ought to be construed as an *English* one.

The question then is what is the true effect of the deed of the 16th of October 1838? Now it seems to me that, in respect of the 2,000 *l.* which came from Mrs. *Duncan*'s aunts, Mr. *Duncan* was a purchaser for valuable consideration: for, by the deed of the 31st of March 1828, the 3,000 *l.* was to be paid, to Mrs. *Duncan*, at a certain time after the death of the survivor of her two aunts. Then Mr. *Duncan* proposed, to Miss *Marion Campbell* (who had survived her sister) that, if she would pay down 2,000 *l.*, part of the 3,000 *l.*, he would consent to the 1,000 *l.*, the remainder of that sum, being paid to trustees for the separate use of his wife, and would settle, not only the 2,000 *l.* which was to be so paid down, but also 2,000 *l.* out of his own funds, in the manner therein mentioned. So that Mr. *Duncan* was a purchaser, not only by relinquishing his right to a *chose in action* of his wife's, but by advancing money out of his own pocket. The deed recites that Mr. and Mrs. *Duncan* had applied, to Miss *M. Campbell*, for immediate payment of 2,000 *l.*, in order to enable them to make permanent provisions for the maintenance of themselves and the survivor of them, by sinking that sum, along with a similar sum of Mr. *Duncan*'s own funds, on an annuity or yearly or half-yearly payment on their joint lives and the life of the survivor of them, or by investing the same in the government or other public

securities in the names of trustees, so that the interest or dividends should be paid, to them, during their joint lives, and the principal sum be at the disposal of the survivor, he, Mr. *Duncan*, in consideration of such immediate payment, being willing that the remaining 1,000 *l.* of the legacy, when payable, should be paid, to trustees, for Mrs. *Duncan*'s own use exclusively. The deed then recites that Miss *M. Campbell* had agreed to the proposal so made to her by Mr. and Mrs. *Duncan*, and, in consequence, had made payment, to them, of the 2,000 *l.* Then, in consideration of that payment, Mr. and Mrs. *Duncan* assign the 1,000 *l.* to Mr. *J. Deans Campbell* and his co-trustees, for the use of Mrs. *Duncan*; and Mr. *Duncan* renounces his *jus mariti* with regard to that sum; and then binds himself, at the sight of Mr. *J. D. Campbell*, immediately to invest the 2,000 *l.* paid by Miss *Campbell*, along with a like sum of his own funds, for an annuity or yearly or half-yearly payment during the joint lives of himself and his wife and the survivor of them, either by sinking the same sums by way of annuity as before mentioned, or by investing them in the government or other public security or securities, in manner before mentioned, or in such other way or manner as might be sanctioned by Mr. *J. D. Campbell*, taking care that the same should be safely invested so as to secure the punctual payment of the annuity or the interest or dividends arising on the said securities. This last part of the deed imposed an obligation on Mr. *Duncan*; and he has fulfilled it. Then the only question is what is the trust that results from the expressions used in the deed. Now, in *Page* v. *Way* the trustees were directed to pay and apply the rents and profits of the trust-property, unto or for the maintenance and support of *F. Jones, his wife and family*; and, in *Rippon* v. *Norton*, the trust was to apply

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the profits of the property for the board, lodging and subsistence of *J. Rippon* the younger *and his family.* But, in this case, there are no such expressions: the annuity or the income of the securities in which the 4,000 *l.* might be invested, were to be paid to Mr. and Mrs. *Duncan* only, during their joint lives; and, under those words, Mr. *Duncan* would be entitled to receive the whole. And, if that be so, would it not be strange to say that he shall be deprived of the benefit which he is entitled to under the deed, because his wife has so misconducted herself that he is justified in living separate from her? *Sidney* v. *Sidney* is not an authority for that proposition, but for the converse of it; for it decided that the wife was entitled to compel her husband to perform the articles entered into on their marriage, notwithstanding she had been guilty of adultery.

I shall, therefore, declare that Mr. *Duncan* is entitled to the interest of the trust fund during the joint lives of himself and his wife; and as Mr. *J. D. Campbell* has taken upon himself to decide as to the rights of the parties under the deed, and has paid part of the interest to Mrs. *Duncan,* the order which I shall make with respect to the costs of the suit, is that the Plaintiff do pay Mr. *Trimmer* his costs, and that Mr. *Campbell* do pay the Plaintiff his costs, and also the amount of the costs paid, by the Plaintiff, to *Trimmer.*

CROFT *v.* ADAM.

1842:
4th June.

Deed.
Construction.
Trust.
Power.

A widow, by the settlement on her second marriage, settled 2,300*l.* which had belonged to her first husband, in trust for her separate use for life; and declared that, subject thereto, the fund should, as and whenever she should think fit or be advised, be settled upon trust for the benefit of her daughter and only child by her first husband and of her daughter's intended husband and her child and children, in such manner and for such rights and interests as should be agreed upon either previous to or after her daughter's marriage, with her consent, and that she (the mother) should have full power to settle the fund or any part of it, in trust for the immediate benefit of her daughter and her child and children, in manner aforesaid, to take effect either upon such marriage, or upon or immediately after her own death, as she should think fit; but, if the daughter should not be married in the mother's lifetime and should survive her, then the fund should be assigned to the daughter at 21 or on marriage, but, if the daughter should die in her mother's lifetime without having been married, then the fund should be held in trust for the children of the mother's second marriage. Held that a trust, and not a power, was created in favour of the daughter, her husband and children; but that the mother, if she thought fit, might modify the interests of the *cestuis que trust*, on the daughter marrying with her consent.

BY the settlement on the marriage of *Jane Thompson*, widow, with Sir *Everard Home*, dated the 2d November 1792, *Jane Thompson* assigned the sum of 2,300 *l.*, to which she was entitled under the will of her late husband, to trustees, in trust, subject to her appointment by any note or writing under her hand, for her separate use during her life. The settlement then declared that, subject to the separate right and interest of *Jane Thompson*, during her life, in and to the interest of the 2,300 *l.*, the same should, *as and whenever the said Jane Thompson should think fit or be advised, be settled upon trust for the benefit* of *Amelia Thompson*, her daughter and only child by her late husband, *and of her intended husband and her child or children, in such manner and for such rights and interests as should be agreed upon, either previous to or after the marriage of the said Amelia Thompson with the consent and approbation of the said Jane Thompson her mother; and that the said Jane*

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Thompson should, by virtue of this settlement, be at free liberty and have full power and authority to settle the 2,300 *l., or any part thereof, in trust for the immediate benefit of her said daughter and her child and children in manner aforesaid, to take effect either upon such marriage, or upon or immediately after the decease of the said Jane Thompson,* as she should think fit, notwithstanding her coverture, and whether married or sole; *but if Amelia Thompson should not be married in her mother's lifetime and should her survive, then that the* 2,300 *l. should be upon trust for the benefit of Amelia Thompson, and should be a vested interest, and assigned or transferred to her upon her attaining the age of* 21 *years,* or on her marriage before that age, as the event should happen: but if *Amelia Thompson* should die in her mother's lifetime without having been married, then that the 2,300 *l.* should be upon the same trusts as were thereinafter declared concerning the sum of 1,000 *l.* The trusts declared of the 1,000 *l.* (which also was the property of Mrs. *Thompson*) were for the benefit of herself and her intended husband and the children of their marriage.

In 1811, Miss *Thompson* married Sir *Frederick Adam*; and, by their marriage settlement, 20,000 *l.* consols, the lady's property, and all other property that might come to or devolve upon her during the coverture, were settled in trust for her and her husband and their children: but Lady *Home* never made any settlement of the 2,300 *l.*

Lady *Adam* died in June 1812, leaving a daughter, named *Amelia*, the only issue of her marriage: and Sir *F. Adam* took out administration to her. In February 1833 Miss *Adam* married Major *Boileau*. She died a few months afterwards, without issue; and her hus-

band took out administration to her. Lady *Home* survived Sir *Everard*, and died in May 1841.

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The bill was filed by the trustees of the settlement of 1792, against Sir *Frederick Adam*, Major *Boileau* and Lady *Home*'s executors, stating that the Defendants severally claimed the 2,300*l.*; and praying that the trusts of that settlement, so far as they regarded the 2,300*l.*, might be carried into execution under the direction of the Court.

The cause now came on to be heard as a short cause.

Mr. *G. Richards* and Mr. *G. L. Russell* appeared for the Plaintiffs.

Mr. *Stuart* and Mr. *J. Baily* for Major *Boileau*, and Mr *Romilly* for Sir *Frederick Adam*, said that the clause contained in the settlement of 1792 in favour of Miss *Thompson*, her husband and children, created, not a mere *power*, but an executory *trust*, subject to Lady *Home*'s life interest: that the second branch of the clause, commencing with the words: "And that the said *Jane Thompson* shall, by virtue of this settlement, be at free liberty," enabled the mother to extend her bounty to her daughter in her lifetime; *Brown* v. *Higgs* (*a*), and *Brown* v. *Pocock* (*b*): that, if it were necessary to have recourse to implication in this case, a trust for Lady *Adam* might be implied from the circumstance that the 2,300*l.* was not given over, except in the event of her dying unmarried in her mother's lifetime, which had not happened.

(*a*) 8 Ves. 561. (*b*) *Ante*, Vol. VI. p. 257.

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Mr. *Bethell* and Mr. *Elmsley*, for Lady *Home's* executors, said that the cases in which words apparently importing a power, had been held to create a trust, were cases in which the donor and the donee were distinct persons; but, in the present case, Lady *Home* was the absolute owner of the 2,300 *l.*, and also both the donor and the donee of the power: that the clause under discussion could not be divided into two parts, as had been contended for the other Defendants, but must be taken altogether; and that the language of the clause throughout, and more especially the words: "as and whenever the said *Jane Thompson* shall think fit or be advised," and the words: "in such manner and for such rights and interests as shall be agreed upon," showed that Lady *Home* (who was under no obligation whatever to settle the fund on her daughter, her husband or children) meant to reserve, to herself, a *power* to appoint the fund in favour of those individuals, at whatever time and in whatever manner she might think fit: that, in order to create a trust, there must be a definite subject, a definite object and a definite time at which the interest of the *cestui que trust* is to vest; but, in the present case, the time, the object, and the subject, were left in uncertainty: that the settlement was a contract between Lady *Home* and her then intended husband, and that she plainly intended, by the clause in question, to stipulate that she should have the entire control over the fund in case her daughter married during her lifetime. They referred to the following passage in the judgment in *Brown* v. *Higgs* (*c*). "The principle of that case (*Harding* v. *Glyn*), and of *Richardson* v. *Chapman*, which went to the House of Lords, and all these cases, is that, if the power is a power which it is the duty of

(*c*) 8 Ves. 574.

the party to execute, made his duty by the requisition of the will, put upon him, as such, by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those for whose benefit he is called upon to execute it."

Mr. *Neate* appeared for another Defendant.

The VICE-CHANCELLOR:

That part of the settlement upon which the question in this case has arisen, is very inaccurately expressed; and, in order to determine what effect ought to be given to it, we must take the whole of it together.

It provides for three events: first, the marriage of the daughter in the lifetime and with the consent of her mother: secondly, the daughter's surviving her mother without having married in her mother's lifetime; and, thirdly, the daughter's dying in the lifetime of her mother without having been married. But there is no provision for a fourth event, namely, the daughter's marrying in her mother's lifetime, without the consent of her mother; and that is a very important point.

Now, it seems to me that, by the first branch of the clause relating to the first contingency, which ends with the words: " with the consent and approbation of the said *Jane Thompson*," an interest was created in the daughter, her husband and children, if the mother consented to the marriage: but it was an interest which the mother was to have the power of modifying. Then

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the second branch of the same clause provides that the mother should have liberty to settle the 2,300 *l.* for the immediate benefit of her daughter and her child and children. Now those words have a distinct meaning: for though Mrs. *Thompson*, under the trust previously declared for her separate use, had a power to dispose of her life-interest by note or writing under her hand, yet these words enabled her to divest herself of her life-interest, in favour of her daughter, by a mere, verbal approbation of a settlement: and, moreover, this second branch of the clause enabled her so to modify the interest previously created, as to disappoint the husband of her daughter. As the right of the parties to take, was made to depend upon the mother's previously consenting to the marriage, there is no inconsistency in saying that, though she consented, yet the trust should be liable to such modification as she might think fit to make.

The expression, 'as and whenever,' was relied on by the counsel for the executors: but there is no magic in words; they amount to nothing more than 'as she shall think fit or be advised.'

There being then, as I apprehend, a trust created, in this case, in favour of Miss *Thompson*, her husband and children, with a power vested in her mother to modify it, but which power was never exercised at all, the only remaining question is, who is entitled to take under that trust. Now, in *Harding* v. *Glyn* (*d*), a testator gave certain chattels to his wife, and desired her, at or before her death, to give them to such of his own relations as she should think most deserving and approve of. The

(*d*) 1 Atk. 469.

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wife disposed of some of the chattels by her will, but made no disposition whatever of the rest of them; and the *Master of the Rolls* held that the chattels as to which the wife had not exercised her power of disposition, ought to go to the next of kin of the testator at her death. Therefore, in the present case, as Lady *Home* did not exercise any authority whatever with respect to the trusts declared of the 2,300*l.* by the settlement of 1792, my opinion is that Sir *Frederick Adam* is entitled to that sum for his life, with remainder to Major *Boileau*, absolutely, as the husband and personal representative of his late wife.

BRIDGE *v.* YATES*.

1842: 14th and 18th February.

Joint-tenancy. Tenancy in common. Will. Construction.

Testator gave one-fourth of his residuary estate to trustees, in trust for his wife for life, and, after her decease, in trust for and to be equally divided amongst all his children who should be then living, and the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living. Two children, and two grandchildren the issue of a deceased child of the testator, were living at the death of the widow. Held that the two grandchildren took, *as between themselves*, as joint-tenants, and not as tenants in common.

SAMUEL BRIDGE, by his will dated the 3d of February 1818, gave his real and personal estates to trustees in trust to sell and to stand possessed of the proceeds in trust for and to be equally divided between his wife *Alice Bridge* and all and every his children who should be living at his decease, share and share alike, and for the issue of such of his said children as should be then dead, *equally amongst them, if more than one, share*

* The Reporter was not able to procure the brief in this case, in sufficient time to enable him to report it according to its date.

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and share alike, such last-mentioned issue taking, amongst them, the part or share only which his, her or their deceased parent or parents would have been entitled unto if living: and, as to the share of his wife, he directed his trustees to pay the dividends and interest thereof to her during her life for her separate use; and, after her decease, to stand possessed of her share in trust for and to be equally divided amongst all and every his children who should be then living, *and the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living*; and, as to the share or shares of such of his said children being a son or sons, that his trustees should transfer the same to him or them when he or they should respectively attain the age of 21 years; and, as to the share or shares of such of his said children as should be a daughter or daughters, that his trustees should, upon her or their attaining the age of 21 years or being married, which should first happen, pay the dividends and interest thereof unto such daughter or daughters respectively for her or their respective life or lives for her or their separate use; and, after the several and respective deceases of his said daughters, then as to such her or their several and respective share or shares, in trust for such person or persons &c. as she or they should, by her or their respective last will or testament in writing, appoint; and, in default thereof, then in trust as to the several and respective shares of his said daughters, for her or their respective issue or issues, child or children, share and share alike, at their several attainments to the age of 21 years; and if any of his said children, being a son or sons, should die under the age of 21 years, or, being a daughter or daughters, under that age and unmarried, then the share of him, her or them so dying,

should be paid to the survivor or survivors of them, his said children, equally, share and share alike, and to the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have taken if living at such time as his, her, or their original share or shares would become payable under the trusts aforesaid.

The testator left his wife and three children living at his death. One of those children, a daughter, died in 1823. She had two children, one of whom died in the lifetime of the testator's widow. The widow died in 1836.

One of the questions in the cause was whether, on the widow's death, the daughter's surviving child took a third or only a moiety of a third of the share of the testator's estate, which was bequeathed in trust for the widow for her life; or, in other words, whether the daughter's two children were joint-tenants or tenants in common of that third.

Mr. *Lewin*, for the personal representative of the daughter's deceased child, said that, in construing a will, the rule was to favour a tenancy in common rather than a joint-tenancy: that the testator, in other parts of his will, had created tenancies in common, not only as amongst his children, but also as amongst their issue; and, therefore, it was reasonable to infer that the testator intended to create a tenancy in common by the clause in question; *Woodgate* v. *Unwin* (*a*).

Mr. *Rasch*, for the daughter's surviving child, cited *Stratton* v. *Best* (*b*).

(*a*) *Ante*, Vol. IV. p. 129. (*b*) 2 Bro. C. C. 233.

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Mr. *Spence* and Mr. *Geldart* appeared for the other parties.

The VICE-CHANCELLOR:

It seems to me that, under the trust first declared in favour of the testator's children living at his death and the issue of such of them as should be then dead, both the children and the issue of a deceased child, would take, as between themselves respectively, as tenants in common: for the words: "equally amongst them, if more than one, share and share alike," apply both to the children and to issue of a deceased child. Then the testator directs the trustees, after his wife's death, to stand possessed of her share of his estate, in trust for *and to be equally divided* amongst all and every his children who should be then living and the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living: the issue, therefore, would have taken their deceased parent's share, as tenants in common with the surviving children. But the testator speaks of no division amongst the issue themselves; and, therefore, my opinion is that they take their parent's share as joint-tenants with each other.

Lord *Coke*, in his Commentary on *Littleton* (*c*), says: "If lands be demised for life, the remainder to the right heirs of *J. S.* and of *J. N.*; *J. S.* hath issue and dieth, and, after, *J. N.* hath issue and dieth, the issues are not joint-tenants; because the one moiety vested at one time, and the other moiety vested at another time &c." But, I apprehend that the learned author means that the issue of *J. S.* do not take as joint-tenants with the issue of *J. N.*; and not that the issue of either

(*c*) 188 a.

J. S. or *J. N.* do not take as joint-tenants as between themselves.

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Besides, it seems to me that the point now under consideration, has been decided by the case of *Oates* v. *Jackson* (*d*); and therefore, I shall declare that the surviving child of the testator's deceased daughter is entitled to a third part of that share of the testator's estate which his widow was entitled to for her life.

(*d*) 2 Strange, 1172.

COOKE v. TURNER.

1844: 23d May.

Costs.
Fees to Counsel.

The Plaintiff's solicitor employed a Queen's Counsel and a junior to oppose a motion for further time to answer. The Court held that he was justified in so doing; and ordered the *Taxing-master*, who had disallowed the fees of the junior Counsel, to review his taxation.

TWO of the Defendants, after they had made an application to the *Master* which was unsuccessful, moved the Court for further time to answer the bill. Affidavits were made both in support of and in opposition to the motion; and it was supported by Mr. *Bethell* and Mr. *Willcock*, and opposed by Mr. *Stuart* and Mr. *Freeling*.

The *Vice-Chancellor* allowed the Defendants six weeks' further time to answer, and ordered them to pay the costs of the motion. The *Taxing-master*, when the Plaintiffs' costs of the motion were taken before him, considered that the application was not of sufficient importance to justify the employing of two Counsel to oppose it; and, therefore, disallowed the fees paid to Mr. *Freeling* and his clerk with the brief and for settling an affidavit, and also the solicitor's charges for attendances on Mr. *Freeling*. The sums disallowed amounted to 5*l.* 8*s.* The Plaintiffs thereupon presented a petition praying that the petitioners might be allowed the several sums before mentioned, and that it might be referred back to the *Taxing-master* to review his taxation.

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Mr. *Stuart* appeared in support of the petition.

Mr. *Bethell* opposed it.

The VICE-CHANCELLOR:

With respect to the fees paid to the junior Counsel, my opinion is that there has been a miscarriage: and, though the sums are small, yet the principle is very important.

I remember, perfectly well, many years ago, observing Sir *Anthony Hart* refuse to take a brief merely because there was no junior Counsel with him.

[Mr. *Bethell*:—That is the rule in Causes now: no one of us takes a brief in any Cause without a junior.]

And I remember that Lord *Eldon* said in the House of Lords (when there was some objection made to the fact of two Counsel appearing) that it was of extreme importance, to the public at large, that there should be a successive body of gentlemen brought up, who should understand their profession by knowing it from the beginning: and, in my opinion, it would be most injurious, not merely to the gentlemen who compose the bar at the particular time, but to the public at large, if the supply of able men were to be cut off by preventing the younger branches from learning their profession. The consequence of which would be that it would be a matter of chance, whether, when the gentlemen who are within the bar, drop off, their places would be supplied by persons of sufficient learning and ability. I shall, therefore, refer it back to the *Master* to review his taxation; and the costs of the petition must be costs in the cause.

ERRATUM:

In some of the copies of this Part, the case of *Moore* v. *Moore*, 1 Coll. 54, is omitted in the note to *Brown* v. *Bamford*, ante 615.

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PRINCIPAL MATTERS.

ACCOUNT.

In a suit by a principal against his steward and agent, the decree, in conformity to the prayer of the bill, directed an account to be taken of rents, profits and timber-money received by the defendant on the plaintiff's account; and also directed the Master, in taking the accounts, to make to the parties all just allowances. The defendant was a solicitor, and had acted, as such, for the plaintiff, during his stewardship; and bills of costs were due to him from the plaintiff. The Master, at the plaintiff's request, taxed the bills, and, in taking the accounts under the decree, included the reduced amounts of them amongst the just allowances to which the defendant was entitled. The plaintiff excepted to the report on that account: and the Court allowed the exceptions. [*Jolliffe* v. *Hector*] - - - - - - 398

ACCRUER.

See SURVIVORSHIP, 1.

ACCUMULATION.

Testator, after devising his estates in strict settlement, directed that, in case he should not erect a mansion house on his estates, in his lifetime, his trustees should, forthwith after his death, erect the same according to such plan as he should approve of in his lifetime; or, if he should die before such plan should be prepared and completed, then according to such plan as his trustees, with the consent of the person, for the time being beneficially entitled to the immediate freehold of his estates, should think proper to adopt: and he gave 20,000 *l.* to the trustees, to be applied in erecting the house, and, in the meantime, to be laid out in the funds and the dividends to be accumulated; and the accumulations, as well as the original fund, to be applied in erecting the house, and the surplus (if any) to be laid out in the purchase of lands to be settled to the same uses as the devised estates. Owing to opposition on the part of the tenant for life, the trustees did not build the house

until more than 21 years after the testator's death; and they invested the 20,000 *l.* and accumulated the income of it during the whole of the interval. Held that the direction for accumulation was not within the Thellusson Act, but that the whole of the accumulated fund was applicable to the purposes directed by the will. [*Lombe* v. *Stoughton*] - - - - - 304

ACKNOWLEDGMENT.

In 1835 A. filed a creditor's bill, against the administrator of his debtor, founded on a debt due on a promissory note, but in respect of which no payment of either principal or interest had been made since 1823. In 1832 the administrator, on the citation of a third person, signed and exhibited, in the Ecclesiastical Court, an inventory and account of the late debtor's assets and debts, in which A.'s debt was entered. Held that that entry was a sufficient acknowledgment, within Lord Tenterden's Act (9 Geo. 4, c. 14), to take the debt out of the Statute of Limitations (21 Jas. 1, c. 16). [*Smith* v. *Poole*] - - - - - - - - 17

See AGENT.

ADMINISTRATION.

1. Testator gave all his real, leasehold and personal property to trustees, upon the trusts after mentioned; and, to effect those trusts, he directed them to sell all his property, in order to form a fund to pay his debts and legacies, and then to dispose of the residue as after directed. The testator next gave several legacies, and then gave the residue of his property remaining in the hands of his trustees, to trustees for a charity. The Vice-Chancellor held that the leasehold and other personal property were alone liable to the payment of the debts and legacies. But the Lord Chancellor, on appeal, differed from his Honor, and held that the debts and legacies were payable out of the mixed fund, composed of the produce of the real as well as the leasehold and other personal estates, in proportion to the relative values of those three estates. [*Attorney - General* v. *Southgate*] - - - - - - - 77

2. Specific legacies are to be applied in payment of specialty debts in priority to real estates devised. [*Cornewall* v. *Cornewall*] - 298

See ASSETS.—COSTS, 1.—EXONERATION.—STOP ORDER.

ADMINISTRATOR.

See STOP ORDER.

ADVOWSON.

A testator, who was both patron and incumbent of a living, devised the advowson and all his other real estates, and also his personal estate, to trustees in trust to pay the *rents*, dividends, interest and annual income of his real estates, until they should be sold as thereinafter directed, and also of his personal estate, to his sister, until she should have a child, and immediately after her having a child, in trust to stand seised and possessed of his real estates, if not then sold, and of his personal estate and the *rents*, dividends, interest and annual income

thereof, in trust for her children or child who should attain 21, their heirs &c.; and if she should have no such child, then in trust, after her death, for the trustees, their heirs &c. The testator then directed his trustees to sell the advowson and his other real estates, with all convenient speed after his death, and to stand possessed of the proceeds upon the trusts before declared of his personal estate: and he empowered his trustees to apply the *rents*, dividends, interest and annual income of the presumptive shares of his sister's children, of his real estates (if not then sold), and, if sold, then of the money arising therefrom, and of his personal estate, for their maintenance during their minorities; and directed that the surplus *rents*, dividends, interest and annual income should be invested and accumulated for the benefit of the children from whose shares the same should be saved. At the testator's death, his sister (who was his heir) had three infant children; and his living having become vacant by his death, the question was whether the children, their mother or the trustees were entitled to present to it. Held that, as the presentation to a living does not produce *rents*, dividends, interest or annual income, the dispositions of the will were not applicable to that species of property, and, consequently, that the testator's sister was entitled, as his heir at law, to present to the living on the existing vacancy. [*Martin* v. *Martin*] - - - - - - 579

AFFIDAVIT.

1. Bill by the obligee in a bond, who had delivered it up, by mistake (as he alleged), to the defendant, the obligor, to recover the amount due on it. The answer admitted the delivery of the bond, and that the defendant had destroyed it, but traversed the allegation as to mistake. Held, at the hearing, that, as the answer admitted the bond to have been destroyed, the Court had jurisdiction; notwithstanding there was not annexed to the bill an affidavit that the bond was lost or not in the plaintiff's custody. [*Crosse* v. *Bedingfield*] - - 35

2. On showing cause against dissolving an injunction, the plaintiff cannot read affidavits to prove allegations, in the bill, of matters of fact, which the answer neither denies nor admits. [*Castellain* v. *Blumenthal*] - - - - - 47

3. The Act of 53 Geo. 3, c. 159, for limiting the responsibility of shipowners, in certain cases, requires an affidavit of certain facts to be annexed to bills filed under it. Held that it was no objection to such an affidavit, that it was sworn four days before the bill was filed, the deponents living at Sunderland. [*Walker* v. *Fletcher*] 420

See TRUSTEE, 1.

AGENT.

A mortgagee in possession of lands at Hendred, having received from the grandfather of the infant heir of the mortgagor, a letter, the contents of which did not appear, wrote in answer as follows: "Concerning the business at Hendred, which you know nearly as well as myself, as there has been nothing kept from you; which I am very willing to settle if your granddaughter is of age. I never told

you any otherways; as I have been informed she is the heiress of what there is. The difference is not worth much. I shall hear from your grand-daughter about the business." Held that the answer was an acknowledgment of the heir's right to redeem the mortgage, and that when she came of age, she was entitled to consider her grandfather as having acted as her agent, and, consequently, that she was entitled to redeem the mortgage at any time within 20 years after the letter was written. [*Trulock* v. *Robey*] - - - 402

See SUBPŒNA.

AGREEMENT.

1. The Court will decree a specific performance of an agreement for the sale of a certain number of shares in a railway company. [*Duncuft* v. *Albrecht*] - - 189

2. A parol agreement for the sale of such shares, is binding; for they are neither an interest in or concerning lands, within the 4th section of the Statute of Frauds; nor goods, wares or merchandizes, within the 17th section. - [*Ibid*]

ALIENATION (RESTRAINT OF).

The dividends of a fund, were directed to be paid to A. for life; but if he assigned or otherwise disposed of them, they were to go over. A. being in prison, and charged in execution for debt, the creditor obtained an order, under 1 & 2 Vict. c. 110, s. 36, vesting all his property in the provisional assignee of the Insolvent Debtors' Court. Held that the dividends of the fund did not go over, but vested in the assignee. [*Pym* v. *Lockyer*.] 394

AMENDED BILL.

Although a plaintiff has amended his bill under an order not expressing that he does not require a further answer, he may (if no answer is filed within the time allowed by the 10th Order of 1833, and he thinks proper to waive the further answer) file a replication under the 14th Order, although that Order applies, in terms, to those cases only in which the order to amend expresses that no further answer is required. [*Hemingway* v. *Fernandes*] - - - - - - - 165

AMENDMENT.

See DEPOSITIONS.—PLEA AND PLEADING, 3.

ANNUITY.

1. Payment decreed of the arrears of an annuity secured by bond, with interest; not exceeding, however, in the whole, the penalty of the bond. [*Crosse* v. *Bedingfield*] 35

2. A testator gave his real and personal estate to his wife, subject, amongst other bequests, to an annuity of 50 *l.* to A. B. *for ever*. Held that on A. B.'s death, intestate, the annuity passed not to his heir, but to his personal representative. [*Taylor* v. *Martindale*] 158

See STATUTE OF LIMITATIONS, 4.

ANSWER.

1. A plaintiff having died before the defendant had answered, his representative filed a bill of revivor and supplement, praying that the defendant might answer it and also the original bill. The defendant put in an answer which was intituled as his answer to the original bill of the plaintiff, "since deceased." The answer was ordered to to be taken off the file. [*Upton* v. *Sowton*] - - - - - - - 45

2. Exceptions to an answer for impertinence cannot be shown as cause against dissolving a special injunction. [*Simeon* v. *Davis*] - 46

3. Although a defendant's name is omitted in the note at the foot of the bill, he must put in an answer, though it be a mere formal one. [*Wilson* v. *Jones*] - - - 361

4. A defendant, who was required to set forth, in his answer to interrogatories, certain entries in the books of a firm of which he was a member, stated, in his answer, that the books were in the joint custody of himself and his copartners, and that he had asked their permission to inspect and make extracts from the books, to enable him to comply with the requisitions of the interrogatories, but that they had refused to permit him so to do. Held that the answer was insufficient; as the defendant had not stated that there was any contract, between him and his copartners, which prevented him from inspecting the books, and making extracts from them, without their permission. [*Stuart* v. *Lord Bute*] - - - - - - 460

APPEAL.

See DECREE(STAYING PROCEEDINGS UNDER), 1-4.

APPOINTMENT.

The enactment in the new Will Act that a bequest to a child of the testator who dies in the testator's lifetime leaving issue living at the testator's death shall not lapse, does not apply to a testamentary appointment. [*Griffiths* v. *Gale*] 327. 354

APPOINTMENT OF NEW TRUSTEES.

See CHARITY, 4.—POWER TO APPOINT NEW TRUSTEES.

ASSETS.

Notwithstanding West India estates are made legal assets by 5 Geo. 2, c. 7, s. 4, they may be devised so as to make them equitable assets. [*Charlton* v. *Wright*] - - 274

See ADMINISTRATION, 1. 2.

ASSIGNEE.

See BANKRUPT.—DEFENDANT, 2.—INSOLVENT, 2.

ATTACHMENT.

An attachment ordered to be issued against a married woman for disobeying an order in a suit which she had instituted by her next friend. [*Ottway* v. *Wing*] - 90

BANKRUPT.

In January 1820, A. and B. who held more than a third of the shares in a Cornish mine, which was then a losing concern and the shares were of very little if any value, became bankrupt. At a meeting of the other shareholders, held in February, at which G., though not then a shareholder, was present, it was

resolved, in order to prevent the mines from being abandoned and the injury which the neighbourhood would sustain thereby, that a new company should be formed, consisting of old adventurers and of persons who might be inclined to purchase shares in the mine, and that, for the security of the latter, the mine should be sold under a decree of the Court of Stannaries, and the debts of the mine paid with the proceeds. Shortly afterwards, G. was appointed assignee of the bankrupts; and then, in order to avoid the responsibility of continuing to hold their shares, he relinquished them under counsel's advice. Afterwards the shares were disposed of amongst old and new adventurers, and G., who had proposed to the trustees for the defendant, then a minor, to take some of the shares, agreed to take eleven, *for himself and friends*; and about the same time the trustees authorized him to take four shares for the defendant. The mine was afterwards sold, in the Court of Stannaries, to G. on behalf of the new company. The purchase-money was paid into Court, and then applied to pay the debts of the mine. Soon afterwards the defendant came of age; and his agents paid G. for the four shares at the rate at which he had purchased the eleven, and the four shares were transferred into defendant's name. The mine continued to be a losing concern to the new company, until after they had prevailed on the defendant, who was the owner of the freehold, to accept a surrender of the lease under which it had been held, and to grant a new lease *at reduced dues, and including new mining ground.* Afterwards G. was removed from the assigneeship, and a renewed commission was issued, under which the plaintiff was chosen assignee of the bankrupts. Notwithstanding the term granted by the old lease had long expired, and the defendant had no knowledge of the bankruptcy, and 15 years had elapsed during which there had been a large expenditure on the mine, the Court declared the defendant to be a trustee of his shares in the mine, including the new ground, and decreed him to account for and pay, to the plaintiff, the profits thereof. [*Turner* v. *Trelawny*] - - 49

See DEFENDANT, 2.—INSOLVENT.

BENEFICE.

See ADVOWSON.

BILL OF REVIVOR.

See PLEA AND PLEADING, 2.

BOND.

See EVIDENCE.—LOST INSTRUMENT.

BOOKS.

Testator gave, to his son, all his plate, jewels, trinkets, and all his furniture and other *articles of domestic use and ornament.* By a codicil, he gave, to his wife, all his provisions, wines, carriages, horses, and all his musical instruments, and *the use of all his books*, and all his money in his dwelling-house and in his banker's and land steward's hands, for her own sole use and benefit. Held that the books were given to the son absolutely; subject to a life-interest in the wife. [*Cornewall* v. *Cornewall*] - 303

BREACH OF TRUST.

In January 1820, A. and B., who held more than a third of the shares in a Cornish mine, which was then a losing concern, and the shares were of very little if any value, became bankrupt. At a meeting of the other shareholders, held in February, at which G., though not then a shareholder, was present, it was resolved, in order to prevent the mines from being abandoned and the injury which the neighbourhood would sustain thereby, that a new company should be formed, consisting of old adventurers and of persons who might be inclined to purchase shares in the mine, and that, for the security of the latter, the mine should be sold under a decree of the Court of Stannaries, and the debts of the mine paid with the proceeds. Shortly afterwards, G. was appointed assignee of the bankrupts; and then, in order to avoid the responsibility of continuing to hold their shares, he relinquished them under counsel's advice. Afterwards the shares were disposed of amongst old and new adventurers, and G., who had proposed to the trustees for the defendant, then a minor, to take some of the shares, agreed to take eleven *for himself and friends*; and about the same time the trusters authorized him to take four shares for the defendant. The mine was afterwards sold, in the Court of Stannaries, to G. on behalf of the new company. The purchase-money was paid into Court, and then applied to pay the debts of the mine. Soon afterwards the defendant came of age; and his agents paid G. for the four shares at the rate at which he had purchased the eleven, and the four shares were transferred into defendant's name. The mine continued to be a losing concern to the new company, until after they had prevailed on the defendant, who was the owner of the freehold, to accept a surrender of the lease under which it had been held, and to grant a new lease *at reduced dues, and including new mining ground.* Afterwards G. was removed from the assigneeship, and a renewed commission was issued, under which the plaintiff was chosen assignee of the bankrupts. Notwithstanding the term granted by the old lease had long expired, and the defendant had no knowledge of the bankruptcy, and 15 years had elapsed during which there had been a large expenditure on the mine, the Court declared the defendant to be a trustee of his shares in the mine, including the new ground, and decreed him to account for and pay, to the plaintiff, the profits thereof. [*Turner* v. *Trelawny*] - - 49

CASE SENT TO LAW.

1. Form of order where a case has been sent to a court of law on the argument of a demurrer, and, on the return of the certificate, the case is sent to another court of law. [*Spry* v. *Bromfield*] - 75
2. A defendant, a purchaser, demurred to a bill for specific performance, and his demurrer was overruled. He then asked for a case to be sent to a court of law, which was granted; and the opinion of the Judges was against him. Ultimately, however, the bill was dismissed with costs. Held that the defendant was entitled to his costs

at law, as well as in equity. [*Forbes* v. *Peacock*] - - 528

3. Testator, amongst other bequests, gave a freehold house, his furniture and certain other chattels, to his wife for life, and willed, that, at her death, his two daughters should divide equally, as *residuary legatees, whatever he might die possessed of, except what was already mentioned in favour of others.* The question was, what was the effect of the words in *italics*, with regard to certain real estates of the testator, which were not particularly mentioned in his will. Held that the Court ought not, in order to determine that question, to inquire into the value and other circumstances of the real estates, nor ought those circumstances to be stated in a case made for the opinion of a court of law upon the question. [*Davenport* v. *Coltman*] 605

CAUSE AND CROSS-CAUSE.

See CROSS-CAUSE.

CERTIFICATE.

If the Lord Mayor and Aldermen have once certified as to the custom of London, the certificate is conclusive; and the Court never refers the same question a second time [*Bruin* v. *Knott*] - - - 453

CESTUI QUE VIE.

Course of proceedings under 6 Anne, c. 18, to compel a lessee *pur autre vie*, to produce the *cestui que vie* to the reversioner. [*In re Lingen*] 104

CHARGE OF DEBTS.

Where a testator has charged his real estate with his debts, and the executor proceeds to sell the estate, the purchaser has a right to ask him, whether all the debts are paid or not, and, if he declines to answer, the purchaser will be considered to have had notice that all the debts have been paid, and will be answerable for the application of his purchase-money. [*Forbes* v. *Peacock*] 528

See STATUTE OF LIMITATIONS, 2.

CHARITY.

1. A school was founded for the education of poor children within a certain district. The district was converted into a dock, under a local Act of Parliament, so that the objects of the charity failed. The Court referred it to the Master to approve of a scheme for the application of the funds of the charity, *cy pres.* [*Attorney-General* v. *Glyn*] - - - - - - - - 84

2. A lease of land already in mortmain, made to a charity, does not require enrolment under 9 Geo. 4, c. 36. [*Ibid.*]

3. Testator, after limiting his Staffordshire estates to his daughter and her sons in strict settlement, recited that he had lately purchased an estate called C. for the purpose of endowing a chapel, but that he had been prevented from carrying his intention into effect: he then devised the C. estate to trustees, in trust to apply the rents upon such trusts and for such purposes as the persons for the time being in possession of his Staffordshire estates, should, in their discretion, appoint; but he trusted that, out

of respect to his memory, they would exercise such power in doing such charitable acts as they knew he would most approve of. Held that both the subject and the object of the trust were clearly pointed out, and that the latter being charitable acts, the trust was void under the Statute of Mortmain. [*Pilkington* v. *Boughey*] - - 114

4. On a petition for the appointment of new trustees of a charity, the Court directed that, in the deed appointing the new trustees, a power should be inserted, for appointing new trustees in future. [*In re* 52 Geo. 3, c. 101] - 262

5. If it appears to be for the benefit of a charity that part of the estates belonging to it should be sold, an order for that purpose may be made on a petition presented under 52 Geo. 3, c. 101. [*Re Parke's Charity*] - - - - - - - - 329

CHILDREN.

See WILL, 4. 6.

COLONIAL WILL.

See WILL, 13, 14.

COMMISSION TO EXAMINE WITNESSES.

1. An order for a commission to examine witnesses was made, on the application of the plaintiffs, in a cause in which Sir J. Brydges and another were plaintiffs, and C. E. Branfill and others were defendants, by original and amended bill: and in which Sir J. Brydges and another were plaintiffs, and Lady Brydges and others were defendants, by bill of revivor and supplement. The commission was made out in *a cause* in which Sir J. Brydges and another were plaintiffs, and C. E. Branfill and others were defendants, by original bill and bill of revivor and supplement. In the title to depositions taken under that commission, both the original and amended bill and the bill of revivor and supplement were mentioned, and the names of the parties to each bill, were set forth at length. A motion by the defendants to suppress the depositions, grounded on the variance between the title of the commission and the title of the depositions, was refused. [*Brydges* v. *Branfill*] - - 334

2. Commissioners for examining witnesses, need not sign every skin of the interrogatories; it is sufficient if they sign the last skin. [*Ibid.*]

3. Although it is usual to express in the title to depositions, that they have been taken by virtue of a commission, "to us (naming only the acting commissioners) and others directed," yet, if the names of *all* the commissioners are inserted, the depositions will not be suppressed because they are not signed by all the commissioners, provided they are signed by those who acted. [*Ibid.*]

4. Commissioners for examining witnesses, omitted to certify, in their return to the commission, that they and their clerks, before acting, took the oaths annexed to the commission. The Court at first ordered the depositions to be suppressed; but on being satisfied, by the affidavit of one of the commissioners, that the oaths had been duly taken, allowed the return to the commission to be amended by inserting that fact. [*Ibid.*]

COMMITMENT.

See PRACTICE, 15.

CONSENT.

See FEME-COVERTE.

CONSTRUCTION.

1. A testatrix, having 115*l.* long annuities standing in her name at her death, of which 65*l.* like annuities had been purchased for her by T. B., bequeathed her residuary estate to trustees, to be invested or continued by them in the public funds or at interest, the stocks, funds or securities to be varied at discretion, in trust to pay certain annuities out of the interest, dividends &c., and, subject thereto, to pay the income of the said trustmonies, stocks, funds and securities, to S. N. for life, and, subject thereto, she gave all the residue of her estate to the trustees absolutely. By a codicil she gave all the money funded by T. B. in her name in the long annuities (which she mentioned to be 50*l.* per annum) to C. D. after the death of S. N. Held that 50*l.* of the long annuities, were specifically bequeathed to C. D. [*D'Aglie* v. *Fryer*] 1

2. Testator bequeathed to J. W. 1,000*l.*; to his sister, M. W. 200*l.*; to their mother 200*l.*; and to the three aunts of J. W. and his sister M. W. 100*l.* each. Held that the last bequest included the aunts, but not the sister. [*Trail* v. *Kibblewhite*] - - - - - 5

3. Testator gave 800*l.* to the four children of H. R., to be divided into equal shares, and paid to them at 21, and the interest of their shares to be paid, to their parents, in the meantime: and, in case of either of the legatees dying under 21, then his, her or their shares were to be equally divided amongst the survivors. Two of the children died under 21 in the testator's lifetime. Held that the two survivors were entitled to the *original* share only of the child who died last. [*Rickett* v. *Guillemard*] - - 88

4. Testatrix gave an annuity of 50*l.* to her son in law, for his life, provided he remained unmarried, but if he should marry, the annuity to cease; and, after his death or second marriage, whichever should first happen, she gave 1,000*l.* to be equally divided between her brother and sisters; and, if they should not all be then living, she gave the share of him, her or them so dying to be equally divided between them, her surviving brother and sisters. The testatrix's brother and sisters all died in her son in law's lifetime, and he died unmarried. Held that the brother and sisters took a vested interest in the 1,000*l.* as tenants in common. [*Peters* v. *Dipple*] - 101

5. Testatrix bequeathed 1,300*l.* to trustees in trust, as to one-third, for such of *the children* of A. S. then deceased, as should be living at the testatrix's death; and, as to the remaining two-thirds, in trust for the children of S. T. and T. P. living at the same time. S. T. had grandchildren, but no child living either at the date of the will or at the testatrix's death: but A. S. and T. P. had, each of them, children living at those times. Held that the grandchildren of S. T. could not claim the benefit of the trust. [*Moor* v. *Raisbeck*] - 123

6. Testatrix devised all her freehold messuages &c. in S. to trustees in trust to sell and stand possessed of the proceeds in trust for A., and gave the residue of her personal estate, to the trustees, in trust for B. After the date of her will she sold the houses and conveyed them to the purchaser, and he deposited the conveyance and title-deeds thereof with her, to secure part of the purchase-money. Held that the security and the money due on it did not pass, under 7 Will. 4 and 1 Vict. c. 26 (the late Will Act), to the trustees in trust for A., but to the trustees in trust for B. [*Moor* v. *Raisbeck*] - - - - - 123

7. Testator devised his real estates to trustees, in trust to sell as soon as conveniently might be after his decease, and as to the proceeds, together with the intermediate rents, after payment of the testator's funeral and testamentary expenses, debts and legacies, to pay one moiety to his nephew, and to invest the other moiety in the funds, in trust for his nephew, for life, and, after his death, for his children. The real estates were not sold until some years after the testator's death. Held that rents accrued in the meantime ought not to be invested for the benefit of the nephew and his children, but that the nephew was entitled to them. [*Vigor* v. *Harwood*] - - 172

8. A will contained the following clause: "I recommend that the house and premises may be disposed of as soon as possible, and, after paying all just debts, may be equally divided, share and share alike, Mrs. M., Mr. and Mrs. W. and children, likewise H. H." Held that Mrs. W. was entitled to an equal share of the proceeds of the house and premises, as tenant in common with her husband, her children living at the testator's death, and with Mrs. M. and H. H. [*Paine* v. *Wagner*] - - - 184

9. Testator gave a freehold house to his wife *for her sole use and benefit*, and another freehold house to her *for her life;* and he also gave to her all his household goods, plate &c.: but, if she married again, the whole of the above property was *to become the property* of his daughter; and, in case his wife should remain unmarried, then he gave the second mentioned house to his daughter, for her life, and to her children, after his wife's death: "I also appoint my wife, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease." Held that the fee-simple in the first-mentioned house, passed to the wife. [*Day* v. *Daveron*] - 200

10. Testator gave the residue of his personal estate unto and among all and every the children, sons and daughters, of his daughter Elizabeth, in equal shares and proportions, as and when they should attain their respective ages of 22 years. Held that the children of the testator's daughter living at the testator's death, were the only objects of the bequest; and, consequently, that it was not void for remoteness. [*Elliott* v. *Elliott*] 276

11. Testator gave, to his son, all his plate, jewels, trinkets, and all his furniture and other *articles of domestic use and ornament*. By a codicil, he gave to his wife, all his provisions, wines, carriages, horses, and all his musical instruments,

and the use of all his books, and all his money in his dwelling-house and in his banker's and land-steward's hands, for her own sole use and benefit. Held that the books were given to the son absolutely; subject to a life interest in the wife. [*Cornewall* v. *Cornewall*] 303

12. Testator, by his will, gave an annuity of 1,000 *l.* a year to his wife, for her life, and directed his plate and furniture at H. his family mansion, to be sold. By a codicil, he desired that his wife should be accommodated with any plate she might choose for her own use, and that an inventory should be made of it, and that it should be returned at her death: "and I give to her absolutely any one of my silver inkstands which she may select: I also give, to my dear wife, any part of the beds and bedding, linen, carpets, or other household furniture at H., *which she may require for her own use*, as likewise any wardrobes or glass cases at H. *according to her wish*; and I give to her, in addition to all other provisions, 400 *l.* *per annum* during her life, *to be applied to the rent of any residence* she may choose to live at, and to be raised and paid in like manner as the annuity bequeathed to her by my will." Held that the wife was entitled, *absolutely*, to such parts of the furniture as she might select; and that she was entitled to be paid the 400 *l.* a year, although she had fixed her residence, with her son, at the family mansion. [*Lord Amherst* v. *The Duchess of Leeds*] 476

13. Testator bequeathed 5,000 *l.* in trust for all and every the child and children of his niece, C. A., *and of his nephew, the late James C.*, to be divided amongst them, if more than one, share and share alike, and, if there should be but one such child, then in trust for such only child; the shares of sons to be paid to them at 21, and the shares of daughters at that age or on their marriage. The testator never having had a nephew named James C. who had died leaving issue, the children of his late nephew Henry C. (who was the only one of his nephews who had left issue) claimed to be interested under the bequest, upon which the Master was directed to inquire what persons were meant by the testator. It appeared (amongst other things) from the evidence before the Master, that the testator had had four nephews surnamed C.: that two of them were named James, and another Henry: that one James died 40 years ago, and the other about 16 years before the date of the will, and that Henry died about 10 years before the date of the will, and was the only nephew of the testator who left issue: and the Master found that *his* children were the persons intended. The Court, however, on hearing exceptions to the report, held that the finding was not warranted by the evidence, and referred it back to the Master to review his report. [*Daubeny* v. *Coglan*] - - 507

14. Testator bequeathed his residuary estate in trust for his son and daughter equally, and declared that certain sums which he had lent to his son, should be deducted from his share of the residue, and that certain sums which he had lent to C. W., his daughter's husband, on

bonds, *should be taken and allowed in account as part of her share; and, if the balance should appear to be against C. W., the trustees were to refrain from putting the bonds in force against him*, and to take a security from him for payment of the balance by instalments. The daughter died in the testator's lifetime. Held, nevertheless, that C. W. was released from the debts due from him, and was answerable only for the excess (if any) of those debts beyond the amount of a moiety of the residue. [*South* v. *Williams*] - - - - - 566

15. A testator, who was both patron and incumbent of a living, devised the advowson and all his other real estates, and also his personal estate, to trustees in trust to pay the *rents*, dividends, interest and annual income of his real estates, until they should be sold as thereinafter directed, and also of his personal estate, to his sister, until she should have a child, and immediately after her having a child, in trust to stand seised and possessed of his real estates, if not then sold, and of his personal estate and the *rents*, dividends, interest and annual income thereof, in trust for her children or child who should attain 21, their heirs &c.; and if she should have no such child, then in trust, after her death, for the trustees, their heirs &c. The testator then directed his trustees to sell the advowson and his other real estates, with all convenient speed after his death, and to stand possessed of the proceeds upon the trusts before declared of his personal estate: and he empowered his trustees to apply the *rents*, dividends, interest and annual income of the presumptive shares of his sister's children, of his real estates (if not then sold), and, if sold, then of the money arising therefrom, and of his personal estate, for their maintenance during their minorities; and directed that the surplus *rents*, dividends, interest and annual income should be invested and accumulated for the benefit of the children from whose shares the same should be saved. At the testator's death, his sister (who was his heir) had three infant children; and his living having become vacant by his death, the question was whether the children, their mother or the trustees were entitled to present to it. Held that, as the presentation to a living does not produce *rents*, dividends, interest or annual income, the dispositions of the will were not applicable to that species of property, and, consequently, that the testator's sister was entitled, as his heir at law, to present to the living on the existing vacancy. [*Martin* v. *Martin*] - - - 579

16. A deed in the Scotch form, made between parties, some of whom were domiciled in Scotland, and the others in England, construed, partly according to the law of Scotland, and partly according to the law of England; that is to say, so far as it concerned the Scotch parties, according to the Scotch law, and so far as it concerned the English parties, according to the English law. [*Duncan* v. *Campbell*] - - - - - 616

See ACCUMULATION.—ADMINISTRATION.—ANNUITY.—ANSWER.—DEFENDANT.—DEVISE.—HEIR, 2.—JOINT TENANCY.—LAPSE.—MARRIAGE ARTICLES.—MORT-

MAIN, 3.—PARTIES. — POWER.—PRACTICE, 15.—PRIORITY.—RESIDUE, 1.—SETTLEMENT.—WILL, 2. 6. 10. 15-17.

CONTEMPT.

1. A defendant, though he is in contempt for want of answer, may except to the bill for scandal, but not for impertinence. [*Everett* v. *Prythergch*] - - - - - 363

2. The 5th rule of 11 Geo. 4 & 1 Will. 4, c. 36, directs that where a defendant is in custody for a contempt in not answering, the plaintiff shall bring him, by *habeas corpus*, to the bar of the Court within a certain specified time, and that, in case he shall not be brought up within that time, he shall be discharged out of custody. A *habeas corpus* for bringing up a defendant, expired before he was brought up: but he was brought up within the time prescribed, and was then committed to the Fleet Held that the committal was regular. [*Colley* v. *Candler*] - 408

3. A party against whom a decree had been made with costs, appealed from it; and, afterwards, moved to stay the execution of it. The Court allowed the motion to proceed, notwithstanding the party was in contempt for non-payment of the costs. [*Herring* v. *Clobery*] 410

4. The Court refused to discharge a plaintiff who was in custody for a contempt in not paying costs which he had been decreed to pay, notwithstanding he had appealed from the decree, and deposed that it was of the greatest importance to him, and to an infant co-plaintiff (his daughter), that he should have his personal liberty to enable him to prosecute the appeal, and to instruct his counsel and solicitor, and otherwise to assist in the conduct of it. [*Herring* v. *Clobery*] 410

5. A. and B. each instituted a creditor's suit against C., the executrix of their deceased debtor. A decree having been made in A.'s suit, C. obtained an order staying B.'s suit. C. being in contempt for want of answer in that suit, the order was drawn up in the other suit. [*Turner* v. *Dorgan*] 504

CONVERSION.

1. Testator devised a real estate to his daughter for life, and then to be sold, and the proceeds divided amongst her children. One of her children died in her lifetime, having devised his share of the estate to his son. Held that the deceased child took his share of the estate as personalty in reversion expectant on his mother's death; and, consequently, that his executrix, and not his son, was entitled to it. [*Elliott* v. *Fisher*] - - - 505

2. Testator devised his real estates to trustees in trust to sell, and to pay the proceeds to the person or persons who, at the decease of S. M. and M. W., was or were their heirs or co-heirs at law respectively, in equal moities. One of the trustees was the testator's heir; and he and his co-trustees sold part of the estates shortly after the testator's death. The heir then died; and, after his death, it appeared that the persons who were the heirs of S. M. and M. W. at their respective deaths, had died in the testator's lifetime; and consequently the trusts declared in their favour,

failed. Held that the testator's real estates were not absolutely converted, by his will, into personalty, but only for the purpose expressed therein, and, that purpose having failed, that they descended to his heir. Held also that the proceeds of that part of the estate which had been sold by the testator's heir and his co-trustees, was sold under an erroneous impression, that one or more of the intended *cestuis que trust* might be in existence, and, consequently, that those proceeds also must be considered as part of the real estates of the heir. [*Davenport* v. *Coltman*] - - - - - 610

COSTS.

1. A married woman being entitled to a share of a residue for her life, with remainder to her children, who were infants, a bill was filed by her and her husband and their children, by their father, as their next friend, against the executor and the co-residuary legatees, for the administration and distribution of the testator's estate. When the executor put in his answer, a balance was due from him, and he paid it into Court. Afterwards, he paid the whole of testator's debts remaining unsatisfied, some of them before and the rest after the usual decree; whereby a balance greater than the fund in Court became due to him: and the Master so found. After the report had been absolutely confirmed, the husband died, and his widow having declined to take any step towards the further prosecution of the suit, the executor filed a supplemental bill, praying to have the fund in Court, exempt from all costs, paid to him, in part of the balance found due by the Master. The Court ordered the executor's costs of both suits, as between solicitor and client, to be first paid out of the fund, then the costs of the defendants, the co-residuary legatees, of both suits, and, lastly, the costs of the widow and children, of the supplemental suit, but not of the original suit. [*Jackson* v. *Woolley*] - - - - - 12

2. If a person out of the jurisdiction, petitions for the taxation of his solicitor's bill, he must give security for the costs of the taxation, and also for the balance that may be found due from him. [*Anon.*] 262

3. If exceptions to the Master's report as to scandal or impertinence are allowed, the Court, on the application of the successful party, will order the costs of the reference to the Master, and also the costs of the application, to be taxed and paid by the unsuccessful party. [*Everett* v. *Prythergch*] - 464

4. A defendant, a purchaser, demurred to a bill for specific performance, and his demurrer was overruled. He then asked for a case to be sent to a Court of Law, which was granted; and the opinion of the Judges was against him. Ultimately, however, the bill was dismissed with costs. Held that the defendant was entitled to his costs at law, as well as in equity. [*Forbes* v. *Peacock*] - - 528

5. The plaintiff's solicitor employed a Queen's counsel and a junior to oppose a motion for further time to answer. The Court held that he was justified in so doing; and ordered the taxing-master, who had

disallowed the fees of the junior counsel, to review his taxation. [*Cooke* v. *Turner*] - - - 649

See ACCOUNT.—DECREE (STAYING PROCEEDINGS UNDER), 1–4.—PETITION.—PRACTICE, 20.—SOLICITOR AND CLIENT.

COUNSEL.

See FEES TO COUNSEL.

CREDITOR.

See COSTS, 1.—PLEA AND PLEADING, 1.

CREDITOR'S SUIT.

See CONTEMPT, 5.

CROSS-CAUSE.

After publication in the original cause, the plaintiffs in the cross-cause, without the leave of the Court, examined witnesses in their cause, some of whom had been examined in the original cause, and as to matters, some of which were in issue in the original cause. The Court, on the application of one of defendants to the cross-suit, ordered the depositions to be suppressed. [*Pascall* v. *Scott*] 550

CUSTOM OF LONDON.

1. By the custom of London, if a freeman dies intestate leaving several children, and one of them dies an infant, his orphanage-share survives to his brothers and sisters, and if another child dies an infant, his accrued as well as his original share survives in like manner: and the accumulations accompany the shares from which they arose. [*Bruin* v. *Knott*] - - - 436

2. A book produced from the muniment-room of the corporation of London, was held to be receivable as evidence of the custom. [*Ibid.*]

3. If the Lord Mayor and Aldermen have once certified as to the custom of London, the certificate is conclusive; and the Court never refers the same question a second time. [*Ibid.*] - - - - 453

CY PRES.

See CHARITY, 1.

DEBT.

See ACKNOWLEDGMENT.—ADMINISTRATION, 1, 2.—ASSETS.—EXONERATION.

DEBTOR AND CREDITOR.

See ACKNOWLEDGMENT.—ASSETS.—CONTEMPT, 5.—EVIDENCE.—HEIR.—INSOLVENT.—JURISDICTION, 2, 3.—LOST INSTRUMENT.—PLEA AND PLEADING, 1.

DECLARATIONS.

Bill by the obligee in a bond, who had delivered it up, by mistake (as he alleged) to one of the co-obligors, to recover the amount due on it. The joint answer of the co-obligors admitted the delivery of the bond, and that one of them had destroyed it; but traversed the allegation as to mistake. Held that declarations made by the obligor to whom the bond had been delivered, tending to prove the plaintiff's allegation, were admissible against the co-obligor. [*Crosse* v. *Bedingfield*] - - - - - 35

DECREE.

In a decree for raising legacies against an infant heir of a devisee whose estate was charged with the legacies, a sale to raise the requisite amount will be directed, but the infant will not then be declared a trustee, so as to enable the Court to order a conveyance under the 6th and 18th sections of 1 Will. 4, c. 60. [*Walters* v. *Jackson*] 278

DECREE (STAYING PROCEEDINGS UNDER.)

1. A plaintiff, whose bill had been dismissed with costs at the hearing, appealed from the decree before any steps had been taken to compel him to pay the costs; the Court however refused an application made by him, to stay the execution of the decree. [*Herring* v. *Clobery*] - - - - - - 410
2. If a party who has appealed from a decree wishes to stay the execution of it, he ought to apply to the Court, as speedily as possible. [*Ibid.*]
3. A party against whom a decree had been made with costs, appealed from it; and, afterwards, moved to stay the execution of it. The Court allowed the motion to proceed, notwithstanding the party was in contempt for non-payment of the costs. [*Ibid.*]
4. The Court refused to discharge a plaintiff who was in custody for a contempt in not paying costs which he had been decreed to pay, notwithstanding he had appealed from the decree, and deposed that it was of the greatest importance to him, and to an infant co-plaintiff (his daughter), that he should have his personal liberty to enable him to prosecute the appeal, and to instruct his counsel and solicitor, and otherwise to assist in the conduct of it. [*Herring* v. *Clobery*] 410

DEED.

See CONSTRUCTION, 16.—HUSBAND AND WIFE, 2.—POWER.

DEFENDANT.

1. Although a defendant's name is omitted in the note at the foot of the bill, he must put in an answer, though it be a mere formal one. [*Wilson* v. *Jones*] - - - 361
2. A. and B. insured, in their joint names, certain leasehold premises which A. had mortgaged to B., and B. paid the premium on the insurance, and the policy was delivered to him. Afterwards the premises were destroyed by fire; and then A. became bankrupt, and his assignees prevailed on the insurance company to pay the money due on the policy to them; and they afterwards paid it into the Bank to the credit of the accountant in bankruptcy. B. filed a bill against the assignees, praying that the money received from the company might be applied in satisfaction of his mortgage-debt. The answer of the assignees tended to impeach the mortgage on the ground of usury. The Court, however, ordered them to pay the amount of the money into Court. [*Rogers* v. *Grazebrook*] - 557

See ANSWER, 4.—CONTEMPT, 2.—PRACTICE, 10.—SOLICITOR, 2.

DEMURRER.

See MULTIFARIOUSNESS.

DEPOSITIONS.

1. An order for a commission to examine witnesses, was made, on the application of the plaintiffs, in a cause in which Sir J. Brydges and another were plaintiffs, and C. E. Branfill and others were defendants, by original and amended bill: and in which Sir J. Brydges and another were plaintiffs, and Lady Brydges and others were defendants, by bill of revivor and supplement. The commission was made out in *a cause* in which Sir J. Brydges and another were plaintiffs, and C. E. Branfill and others were defendants, by original bill and bill of revivor and supplement. In the title to depositions taken under that commission, both the original and amended bill and the bill of revivor and supplement were mentioned, and the names of the parties to each bill, were set forth at length. A motion by the defendants to suppress the depositions, grounded on the variance between the title of the commission and the title of the depositions, was refused. [*Brydges* v. *Branfill*] - - - - - - 334

2. Commissioners for examining witnesses, need not sign every skin of the interrogatories; it is sufficient if they sign the last skin. [*Ibid.*]

3. Although it is usual to express in the title to depositions, that they have been taken by virtue of a commission, "to us (naming only the acting commissioners) and others directed," yet, if the names of *all* the commissioners are inserted, the depositions will not be suppressed because they are not signed by all the commissioners, provided they are signed by those who acted. [*Brydges* v. *Branfill*] - - 334

4. Commissioners for examining witnesses, omitted to certify, in their return to the commission, that they and their clerks, before acting, took the oaths annexed to the commission. The Court, at first ordered the depositions to be suppressed; but on being satisfied, by the affidavit of one of the commissioners, that the oaths had been duly taken, allowed the return to the commission to be amended by inserting that fact. [*Ibid.*]

5. After publication in the original cause, the plaintiffs in the cross-cause, without the leave of the Court, examined witnesses in their cause, some of whom had been examined in the original cause, and as to matters, some of which were in issue in the original cause. The Court, on the application of one of defendants to the cross-suit, ordered the depositions to be suppressed. [*Pascall* v. *Scott*] 550

DEVISE.

Testator gave all his property whatsoever and wheresoever the same might be at his decease, to his wife, for her absolute use for ever, Held that an estate vested in the testator as a trustee, passed by the devise. [*Lindsell* v. *Thacker*] 178

See CONSTRUCTION.—WILL.

DEVISEE AND EXECUTOR.

A., by his marriage settlement, after reciting that he was seised in fee of certain estates, subject to mortgage debts, the amount of which was

mentioned, and which he had contracted, settled the estates, subject expressly to the debts, on himself for life, remainder to secure a jointure for his intended wife, remainder to the first and other sons of the marriage in tail male, remainder to himself in fee, and covenanted for the title, excepting the debts: and he reserved to himself power to raise 10,000*l.* by mortgage of the estates, the mortgage to be made redeemable by the person for the time being entitled to the freehold or inheritance. A. exercised the power, reserving the equity of redemption to himself, his heirs, executors &c., or the person for the time being entitled as aforesaid, and covenanted for payment of the mortgage-money. He then died without issue, having, by his will, charged his real and personal estate with his debts and bequeathed the residue of his personal estate after payment of his debts to B., and having devised his remainder in fee expectant on the failure of his issue male, to his brother and his brother's sons in strict settlement. Held that they were not entitled to have his personal estate applied to exonerate the devised estates from any of the mortgage debts. [*Ibbetson* v. *Ibbetson*] - - - - - - - 206

See CONVERSION, 1.

DEVISEE AND LEGATEE.

See PRIORITY, 1, 2.

DISCOVERY.

See SOLICITORS, 2.

DISTRIBUTION.

Testator directed his residuary real and personal estate to be divided, by his trustees, in such shares and at such times as they should think proper, amongst his nephews, A., B., and C., and his other nephews and nieces, sons and daughters of his late sisters T. and H., who should be living at his decease, and the children of any other such nephews and nieces who, having died in his lifetime, had left issue. There were several children, and children of deceased children, both of T. and of H., living at the testator's death. The trustees not being able to agree as to the division of the property, the Court ordered it to be divided amongst the children, and the children of the deceased children of T. and H., *per capita*. [*Tomlin* v. *Hatfeild*.] 167

DIVORCE.

See SETTLEMENT.

DOMICILE.

See SCOTCH DEED.

DRAINING.

See PETITION, SERVICE OF.

EQUITY OF REDEMPTION.

See MORTGAGOR AND MORTGAGEE, 2.

ESTABLISHING WILL.

See WILL, 13, 14.

EVIDENCE.

Bill by the obligee in a bond, who had delivered it up, by mistake

(as he alleged) to one of the co-obligors, to recover the amount due on it. The joint answer of the co-obligors admitted the delivery of the bond, and that one of them had destroyed it; but traversed the allegation as to mistake. Held that declarations made by the obligor to whom the bond had been delivered, tending to prove the plaintiff's allegation, were admissible against the co-obligor. [*Crosse* v. *Bedingfield*] - - - - - 35

See CONSTRUCTION, 13.—CUSTOM OF LONDON, 2.—TRUSTEE, 1.

EXAMINATION.

See INSUFFICIENCY.

EXCEPTIONS.

1. Plaintiff served defendant with an order confirming a report *nisi*: and, on the eighth day after exclusive of the day of service, he applied for the registrar's certificate of no cause shown, but which the registrar declined to give without the production of counsel's brief on a motion to make the order absolute, which (it was said) could not be made until the then next seal. On the ninth day, the defendant filed exceptions to the report. Held that the exceptions were regularly filed. [*Plunkett* v. *Lewis*] - - 279

2. If exceptions to the Master's report as to scandal or impertinence are allowed, the Court, on the application of the successful party, will order the costs of the reference to the Master, and also the costs of the application, to be taxed and paid by the unsuccessful party. [*Everett* v. *Prythergch*] - 464

3. If the Court, on hearing exceptions to a report, considers the evidence produced before the Master, not to be sufficient to warrant his finding, it will not allow the exceptions simply; but will allow the exceptions, and refer it back to the Master to review his report: thereby giving the unsuccessful party an opportunity of laying further evidence before the Master. [*Daubeny* v. *Coghlan*] - 507

See ANSWER, 2.

EXECUTION.

If a testator, who is unable, from illness, to sign his will, has his hand guided in making his mark, it is a sufficient signature within the Statute of Frauds. [*Wilson* v. *Beddard*] - - - - - - - - 728

EXECUTOR.

1. A married woman being entitled to a share of a residue for her life, with remainder to her children, who were infants, a bill was filed by her and her husband and their children, by their father as their next friend, against the executor and the co-residuary legatees, for the administration and distribution of the testator's estate. When the executor put in his answer, a balance was due from him, and he paid it into Court. Afterwards, he paid the whole of testator's debts remaining unsatisfied, some of them before and the rest after the usual decree; whereby a balance greater than the fund in Court became due to him: and the Master so found. After the report had been absolutely confirmed, the husband died, and his widow having declined to take any step towards the further prosecution of the suit, the executor filed a supplemental bill, pray-

ing to have the fund in Court, exempt from all costs, paid to him, in part of the balance found due by the Master. The Court ordered the executor's costs of both suits, as between solicitor and client, to be first paid out of the fund, then the costs of the defendants, the co-residuary legatees, of both suits, and, lastly, the costs of the widow and children, of the supplemental suit, but not of the original suit. [*Jackson* v. *Woolley*] - - 12

2. An executor is entitled to a residue or share of a residue bequeathed to him, although he has not proved the will. [*Christian* v. *Devereux*] 264

3. If a defendant dies, having appointed two or more executors, and all of them do not prove the will, it is sufficient for the plaintiffs to revive the suit against those who prove. [*Strickland* v. *Strickland*] 463

See STATUTE OF LIMITATIONS, 2.

EXECUTORY TRUST.

See REMOTENESS.

EXONERATION.

A., by his marriage settlement, after reciting that he was seised in fee of certain estates, subject to mortgage debts, the amount of which was mentioned and which he had contracted, settled the estates, subject expressly to the debts, on himself for life, remainder to secure a jointure for his intended wife, remainder to the first and other sons of the marriage in tail male, remainder to himself in fee, and covenanted for the title, excepting the debts: and he reserved to himself power to raise 10,000 *l.* by mortgage of the estates, the mortgage to be made redeemable by the person for the time being entitled to the freehold or inheritance. A. exercised the power, reserving the equity of redemption to himself, his heirs, executors &c. or the person for the time being entitled as aforesaid, and covenanted for payment of the mortgage-money. He then died without issue, having, by his will, charged his real and personal estate with his debts, and bequeathed the residue of his personal estate after payment of his debts to B., and having devised his remainder in fee expectant on the failure of his issue male, to his brother and his brother's sons in strict settlement. Held that they were not entitled to have his personal estate applied to exonerate the devised estates from any of the mortgage debts. [*Ibbetson* v. *Ibbetson*] - - - - - - - 206

FEE-SIMPLE.

See CONSTRUCTION, 9.—WILL, 15.

FEES TO COUNSEL.

The plaintiff's solicitor employed a Queen's counsel and a junior to oppose a motion for further time to answer. The Court held that he was justified in so doing, and ordered the taxing master, who had disallowed the fees of the junior counsel, to review his taxation. [*Cooke* v. *Turner*] - - - 649

FEME-COVERTE.

The Court will not take the consent of a married woman who is under age, to the payment of money to

which she is entitled, to her husband. *Gullin* v. *Gullin*, *ante*, Vol. VII. p. 236, over-ruled. [*Abraham* v. *Newcombe*] - - - 566

See ATTACHMENT.

FOREIGN DEED.

See SCOTCH DEED.

FOREIGN WILL.

See PRACTICE, 17, 18.

FORFEITURE.

See INSOLVENT.

FRAUD.

A tenant for life of settled estates, obtained an Act of Parliament for selling the estates and investing the proceeds, under the direction of the Court, in the purchase of other lands to be settled to the same uses. After the estates had been sold and the money paid into Court, the tenant for life fraudulently obtained an order, under which part of the money was paid out to him. Messrs. B., G. and C., solicitors and copartners, acted as the solicitors of the tenant for life, in obtaining the order and in every other proceeding under the Act. B. was aware of the fraud; but G. and C. were wholly ignorant of it. Held, nevertheless, in a suit instituted by the remainderman after the death of the tenant for life, that G. and C., as well as B., and the estate of the tenant for life, and all the other parties to the transaction, were jointly and severally liable to make good the money. [*Brydges* v *Branfill*] - 369

See BANKRUPT.—SALE UNDER DECREE.

GRANDCHILDREN.

See WILL, 4.

HEIR.

1. An heir at law is not entitled, as a matter of course, to have a second trial of an issue *devisavit vel non*. [*Wilson* v. *Beddard*] - - - 28

2. The 8th sec. of 11 Geo. 4 and 1 Will. 4, c. 60, as expounded by the 2d sect. of 4 & 5 Will. 4, c. 23, applies to the case of the heir of a mortgagee being out of the jurisdiction of the Court. [*Re Thomson*] - - - - - - 392

See PLEA AND PLEADING, 1.

HEIR AND DEVISEE.

See ADVOWSON.—IMPLICATION.

HEIR AND EXECUTOR.

1. A testator gave his real and personal estate to his wife, subject, amongst other bequests, to an annuity of 50 *l.* to A. B. *for ever*. Held that, on A. B.'s death intestate, the annuity passed not to his heir, but to his personal representative. [*Taylor* v. *Martindale*] 158

2. An agreement was made for the sale of an estate at a future time. Before that time arrived, the vendor died intestate. Held that the rents accrued between the vendor's death and time for completing the contract, belonged to the vendor's heir, and not to his executor. [*Lumsden* v. *Fraser*] - - 263

See WILL, 17.

HUSBAND AND WIFE.

1. A single woman being entitled to an annuity secured *by bond*, married. Her husband executed a release of the annuity, and died, leaving his wife surviving. Held that, as he could release the security, he could release the annuity, so as to bind his wife. [*Hore* v. *Becher.*] - - - - - - - 465

2. Mrs. D. being entitled to 3,000 *l.* in reversion expectant on her aunt's death, the aunt consented, at the request of Mr. and Mrs. D., to relinquish her life-interest in 2,000 *l.*, part of the 3,000 *l.*, in consideration of Mr. D. agreeing that the remainder of the 3,000 *l.*, when payable, should be paid to trustees for his wife's separate use, and that he would, immediately, settle 2,000 *l.* out of his own funds, and also the first-mentioned 2,000 *l.*, so as to provide *for the maintenance of himself and his wife*, and the survivor of them. The agreement was carried into effect by a deed which directed the trustees to pay the interest of the two sums of 2,000 *l. to Mr. and Mrs. D. during their joint lives*, and to stand possessed of the principal for the survivor of them. Mr. D. afterwards separated from his wife in consequence of her having committed adultery. Held that he was entitled to receive the whole of the interest of the trust fund: and was not bound to maintain his wife out of it, notwithstanding she was destitute of the means of support. [*Duncan* v. *Campbell*] - - 616

See FEME-COVERTE.—RELEASE, 1. —VOLUNTARY SETTLEMENT.

IMPERTINENCE.

See ANSWER, 2.—EXCEPTIONS, 2 — SCANDAL.

IMPLICATION.

Testator being seised in fee of a house in the town of C., and of estates in the counties of H. and L., gave pecuniary legacies to his two sons (one of whom was his heir), and also to his two daughters, M. and C. He then gave to his wife, for her life, the possession of his house, together with the use of his plate, furniture &c., and the interest of his stock in the funds, during her life; "save and except the clauses in favour of my daughters, as already mentioned; at her decease, it is my will and pleasure that M. and C. *shall divide equally between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others.*" Held that M. and C. took an estate in fee in remainder expectant on the death of the testator's widow, in the house in C., and an estate in fee commencing on the widow's decease, in the estates in H. and L.; and that the widow did not take a life-interest by implication in those estates, but that the heir took them, by descent during her life. [*Davenport* v. *Coltman*] 588

INFANT.

A freeman of London died intestate, leaving an infant son, who, on his father's death, became entitled to his orphanage-share of his father's personal estate, and also to other property. The infant was maintained, by his mother, from his

father's death until his own death. Held that the mother was not merely entitled to be repaid what she had expended, in the infant's maintenance, but to have a liberal allowance made to her, having regard to the whole of the infant's property; and that the amount was not to be paid out of the orphanage-share and the infant's other property, but wholly out of the former; that arrangement being most for the infant's benefit. [*Bruin* v. *Knott*] - - - - - - - - 456

See FEME-COVERTE.—NEXT FRIEND.

INFANT HEIR.

In a decree for raising legacies against an infant heir of a devisee whose estate was charged with the legacies, a sale to raise the requisite amount will be directed, but the infant will not then be declared a trustee, so as to enable the Court to order a conveyance under the 6th and 18th sections of 1 Will. 4, c. 60. [*Walters* v. *Jackson*] 278

INJUNCTION.

1. Exceptions to an answer for impertinence cannot be shown as cause against dissolving a special injunction. [*Simeon* v. *Davis*] 46

2. On showing cause against dissolving an injunction, the plaintiff cannot read affidavits to prove allegations, in the bill, of matters of fact, which the answer neither denies nor admits. [*Castellain* v. *Blumenthal*] - - - - - - - 47

3. The Court refused to extend the common injunction to stay trial, where the plaintiff in equity was served with notice of trial on the 28th of January, but did not file his bill till the 16th of March, and made the motion on the commission-day of the assizes at which the action was to be tried. [*Stokes* v. *Wilson*] - - - - - - - 91

4. On a motion to dissolve an injunction, the defendant may rely on an objection, although it would have been a ground for demurring to the bill. [*Hudson* v. *Maddison*] 416

5. The Court refused to hear a motion to dissolve an injunction, pending a motion, of which the plaintiff had given notice, for production of documents mentioned in a schedule to the answer, no unnecessary delay having taken place in giving notice of the latter motion. [*Storer* v. *Jackson*] - - - - - 503

INSOLVENT.

1. The dividends of a fund, were directed to be paid to A. for life; but if he assigned or otherwise disposed of them, they were to go over. A. being in prison, and charged in execution for debt, the creditor obtained an order, under 1 & 2 Vict. c. 110, s. 36, vesting all his property in the provisional assignee of the Insolvent Debtors' Court. Held that the dividends of the fund did not go over, but vested in the assignee. [*Pym* v. *Lockyer*] 394

2. The assignee of an insolvent debtor, under 1 & 2 Vict. c. 110, being unable to recover an estate belonging to and in the possession of the insolvent, owing to the existence of an old commission of bankrupt against the insolvent (which, however, had been long since aban-

doned, in consequence of all the creditors under it having compromised and released their debts), is entitled to maintain a suit in Chancery against the insolvent and the assignee in bankruptcy, for the recovery of the estate, and for a receiver of the rents in the meantime. [*Hollis* v. *Bryant*] - 492

3. Where a creditor puts in force, against his debtor, the compulsory clauses of 1 & 2 Vict. c. 110, the Insolvent Debtors' Court has no power to compel the debtor to file a schedule of his property. [*Ibid.*]

INSUFFICIENCY.

A defendant, who was required to set forth, in his answer to interrogatories, certain entries in the books of a firm of which he was a member, stated, in his answer, that the books were in the joint custody of himself and his copartners, and that he had asked their permission to inspect and make extracts from the books, to enable him to comply with the requisitions of the interrogatories, but that they had refused to permit him so to do. Held that the answer was insufficient; as the defendant had not stated that there was any contract, between him and his copartners, which prevented him from inspecting the books, and making extracts from them, without their permission. [*Stuart* v. *Lord Bute*] 460

INTEREST.

1. Payment decreed of the arrears of an annuity secured by bond, with interest; not exceeding, however, in the whole, the penalty of the bond. [*Crosse* v. *Bedingfield*] 35

2. A mortgagee in possession, who becomes over-paid pending a suit to redeem, will be charged with interest on the balance, from the date of the report, and on the rents subsequently received by him, from the respective times when those rents were received. [*Lloyd* v. *Jones*] - - - - - - - 491

INTERMEDIATE RENTS.

An agreement was made for the sale of an estate at a future time. Before that time arrived, the vendor died intestate. Held that the rents accrued between the vendor's death and time for completing the contract, belonged to the vendor's heir, and not to his executor. [*Lumsden* v. *Fraser*] - - 263

See CONSTRUCTION, 7.

INTERROGATORIES.

Commissioners for examining witnesses need not sign every skin of the interrogatories; it is sufficient if they sign the last skin. [*Brydges* v. *Branfill*] - - - - - 334

INTESTACY.

See CONSTRUCTION, 14, 15.—IMPLICATION.

ISSUE DEVISAVIT VEL NON.

An heir at law is not entitled, as a matter of course, to have a second trial of an issue *devisavit vel non*. [*Wilson* v. *Beddard*] - - - 28

JOINT-TENANCY.

Testator gave one-fourth of his residuary estate to trustees in trust for his wife for life, and after her de-

cease in trust for and to be equally divided amongst all his children who should be then living, and the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living. Two children and two grandchildren, the issue of a deceased child of the testator, were living at the death of the widow. Held that the two grandchildren took *as between themselves* as joint-tenants, and not as tenants in common. [*Bridge* v. *Yates*] 645

JURISDICTION.

1. If it appears to be for the benefit of a charity that part of the estates belonging to it should be sold, an order for that purpose may be made, on a petition presented under 52 Geo. 3, c. 101. [*Re Parke's Charity*] - - - - - - - - 329

2. The assignee of an insolvent debtor, under 1 & 2 Vict. c. 110, being unable to recover an estate belonging to and in the possession of the insolvent, owing to the existence of an old commission of bankrupt against the insolvent (which, however, had been long since abandoned, in consequence of all the creditors under it having compromised and released their debts), is entitled to maintain a suit in Chancery against the insolvent and the assignee in bankruptcy, for the recovery of the estate, and for a receiver of the rents in the meantime. [*Hollis* v. *Bryant*] - 492

3. Where a creditor puts in force, against his debtor, the compulsory clauses of 1 & 2 Vict. c. 110, the Insolvent Debtors' Court has no power to compel the debtor to file a schedule of his property. [*Hollis* v. *Bryant*] - - - - - - 492

JUST ALLOWANCES.

See ACCOUNT.

LACHES.

See BANKRUPT.

LAPSE.

The enactment in the New Will Act, that a bequest to a child of the testator who dies in the testator's lifetime, leaving issue living at the testator's death, shall not lapse, does not apply to a testamentary appointment. [*Griffiths* v. *Gale*] 327. 354

LEASE.

A lease of land already in mortmain made to a charity does not require enrolment under 9 Geo. 4, c. 36. [*Attorney-General* v. *Glyn*] - 84

LEGACY.

1. An executor who had possessed assets sufficient to pay a legacy, died leaving it unpaid, and having charged his real estates with his debts. The right to sue for the legacy as such, was barred by lapse of time. Held that it could not be claimed under the charge of debts. [*Piggott* v. *Jefferson*] - - 26

2. Testator gave legacies to trustees, in trust for his daughters for their separate use for their lives, and, after their deaths, for their children. By a codicil, after reciting that he had settled, on his daughters, fortunes which he was satisfied his property would allow of being

increased, he gave, to each of them, 500 *l.*, which he directed not to be settled, but to be paid to them. By a second codicil, he gave, to his wife, 3,000 *l.* in lieu of 1,000 *l.* which he had given her by his will. His property proved insufficient to pay the legacies in full. Held that the legacies given by the first codicil, were postponed to the legacies given, to the daughters, by the will, and also to the legacy given to the wife, by the second codicil. [*Stammers* v. *Halliley*] - - 42

3. Testator gave all his real, leasehold and personal property to trustees, upon the trusts after mentioned; and, to effect those trusts, he directed them to sell all his property, in order to form a fund to pay his debts and legacies, and then to dispose of the residue as after directed. The testator next gave several legacies, and then gave the residue of his property remaining in the hands of his trustees, to trustees for a charity. The Vice-Chancellor held that the leasehold and other personal property were alone liable to the payment of the debts and legacies. But The Lord Chancellor, on appeal, differed from His Honor, and held that the debts and legacies were payable out of the mixed fund, composed of the produce of the real as well as the leasehold and other personal estates, in proportion to the relative values of those three estates. [*Attorney-General* v. *Southgate*] - - 77

4. Testator, by his will, gave an annuity of 1,000 *l.* a year to his wife, for her life, and directed his plate and furniture at H., his family mansion, to be sold. By a codicil, he desired that his wife should be accommodated with any plate she might choose for her own use, and that an inventory should be made of it, and that it should be returned at her death "and I give to her absolutely any one of my silver inkstands which she may select: I also give, to my dear wife, any part of the beds, bedding, linen, carpets, or other household furniture at H., *which she may require for her own use*, as likewise any ward-robes or glass cases at H, *according to her wish*; and I give to her, in addition to all other provisions, 400 *l. per annum* during her life, *to be applied to the rent of any residence* she may choose to live at, and to be raised and paid in like manner as the annuity bequeathed to her by my will." Held that the wife was entitled, *absolutely*, to such parts of the furniture as she might select; and that she was entitled to be paid the 400 *l.* a year, although she had fixed her residence, with her son, at the family mansion. [*Lord Amherst* v. *Duchess of Leeds*] 476

5. A legacy was given to the Provost and *Fellows* of Queen's College. The proper name of the corporation was "The Provost and *Scholars*." Held that the Provost and Scholars were entitled. [*Queen's College* v. *Sutton*] - - - 521

6. Testator bequeathed, amongst other stock-legacies, 30,000 *l.* consols to the Provost and Fellows of Queen's College, to be by them expended, within three years after his death, in the purchase of such books for the use of, and to be added to the library of the College, as the Provost and Fellows for the time being, should, in their discretion, think fit: and, in a sub-

sequent paragraph, he directed that if, at his decease, he should not have a sufficiency of stock standing in his name to answer the several stock-legacies aforesaid, his executor should purchase and make up the deficiency out of his residuary estate. The stock standing in the testator's name at his death, was sufficient to answer the bequest to the College. Held that that bequest was specific. [*Queen's College* v. *Sutton*] 521

See ADMINISTRATION.—CONSTRUCTION, 14.—INFANT HEIR.—LONG ANNUITIES.—RESIDUE.—TRUST. WILL, 1. 3. 12.

LENGTH OF TIME.

See BANKRUPT.—LEGACY.

LESSEE, PUR AUTRE VIE.

See CESTUI QUE VIE.

LETTERS OF ADMINISTRATION.

See STOP ORDER.

LONG ANNUITIES.

A testatrix, having 115*l.* long annuities standing in her name at her death, of which 65*l.* like annuities had been purchased for her by T. B., bequeathed her residuary estate to trustees, to be invested or continued by them in the public funds or at interest, the stocks, funds or securities to be varied at discretion, in trust to pay certain annuities out of the interest, dividends &c., and, subject thereto, to pay the income of the said trust-monies, stocks, funds and securities, to S. N. for life, and, subject thereto, she gave all the residue of her estate to the trustees absolutely. By a codicil she gave all the money funded by T. B. in her name in the long annuities (which she mentioned to be 50*l.* per annum) to C. D. after S. N.'s death. Held that 50*l.* of the long annuities were specifically bequeathed to C. D. [*D'Aglie* v. *Fryer*] - 1

LOST INSTRUMENT.

Bill by the obligee in a bond, who had delivered it up, by mistake (as he alleged), to the defendant, the obligor, to recover the amount due on it. The answer admitted the delivery of the bond, and that the defendant had destroyed it, but traversed the allegation as to mistake. Held, at the hearing, that, as the answer admitted the bond to have been destroyed, the Court had jurisdiction; notwithstanding there was not annexed to the bill an affidavit that the bond was lost or not in the plaintiff's custody. [*Crosse* v. *Bedingfield*] - - - - 35

MAINTENANCE.

A freeman of London died intestate, leaving an infant son, who, on his father's death, became entitled to his orphanage share of his father's personal estate, and also to other property. The infant was maintained, by his mother, from his father's death until his own death. Held that the mother was not merely entitled to be repaid what she had expended in the infant's maintenance, but to have a liberal allowance made to her, having regard to the whole of the infant's property; and that the amount was not to be paid out of the orphanage-

share and the infant's other property, but wholly out of the former; that arrangement being most for the infant's benefit. [*Bruin* v. *Knott*] - - - - - - - - 456

See SETTLEMENT.

MARKSMAN.

See EXECUTION.

MARRIAGE ARTICLES.

A marriage contract, in the Portuguese language, between British subjects resident in Lisbon, expressed that the parties were desirous that it should be regulated, made binding and carried into full and complete effect, according to the laws of England Some years afterwards, the parties who were then resident in England, filed a bill, praying that a settlement, in strict conformity with the contract, and containing all the covenants, clauses, powers &c. usually inserted in marriage-settlements, and deemed necessary, and, at the same time, consistent with the substance of the contract, might be executed under the decree of the Court. Held that a power to appoint new trustees as often as should be necessary and (notwithstanding the contract provided that the settled monies should be invested, as they had been, in the English and French funds) that a power to change those securities for any other of the Government stocks or funds of England or France, or for *real securities in Great Britain or Ireland*, were proper powers to be inserted in the settlement. [*Sampayo* v. *Gould*] - - - - 426

MIS-JOINDER.

A bill was filed by five several occupiers of houses in a town, to restrain the erection of a steam-engine which would be a nuisance to each of them. Held that each occupier had a distinct right of suit, and therefore that they could not sue as co-plaintiffs. [*Hudson* v. *Maddison*] - - - - - 416

MISTAKE.

1. A. executed a bond to B. and C., conditioned for payment of an annuity of 100*l.* to D. for life, and assigned an annuity of 120*l.* for the life of one M., and a policy of insurance for 700*l.* on M.'s life, to B. and C., upon certain trusts for further securing the annuity of 100*l.* M. died, and A. died shortly afterwards, having, as was then believed, received the 700*l.* and applied it to his own use. Shortly afterwards, D., in consideration of 500*l.*, released A.'s personal representative and B. and C. from the annuity of 100*l.*, and the securities for it. Some years afterwards, it was discovered that A. had placed the 700*l.* in a bank, in the names of B. and C., where it still remained. Held that the release, having been executed under a mistake, was inoperative, and that the 700*l.* remained impressed with the trusts for securing the annuity of 100*l.* [*Hore* v. *Becher*] - 465

2. A legacy was given to the Provost and *Fellows* of Queen's College. The proper name of the corporation was "The Provost and *Scholars*." Held that the Provos and Scholars were entitled. [*Queen's College* v. *Sutton*] - - - 521

See CONSTRUCTION, 13.

MORTGAGOR AND MORTGAGEE.

1. The 8th sect. of 11 Geo. 4 & 1 Will. 4, c. 60, as expounded by the 2d sect. of 4 & 5 Will. 4, c. 23, applies to the case of the heir of a mortgagee being out of the jurisdiction of the Court. [*Re Thomson*] 392

2. A mortgagee in possession of lands at Hendred, having received from the grandfather of the infant heir of the mortgagor, a letter, the contents of which did not appear, wrote in answer as follows: "Concerning the business at Hendred, which you know nearly as well as myself, as there has been nothing kept from you; which I am very willing to settle if your grand-daughter is of age. I never told you any otherways; as I have been informed she is the heiress of what there is. The difference is not worth much. I shall hear from your grand-daughter about the business." Held that the last-mentioned letter was an acknowledgment of the heir's right to redeem the mortgage, and that, when she came of age, she was entitled to consider her grandfather as having acted as her agent, and, consequently, that she was entitled to redeem the mortgage at any time within 20 years after the letter was written. [*Trulock* v. *Robey*] 402

3. A solicitor invested his client's money on a mortgage, and, by the client's desire, took the mortgage in his own name, without any trust being declared by the deed. In a suit by a judgment creditor of the mortgagor, to redeem, against the solicitor and the mortgagor (who was out of the jurisdiction), held that the solicitor was privileged from disclosing the name of his client, and also the particulars of other mortgages of the property, which had been taken, by other clients of the solicitor, in their own names. Held, also, that the case was an exception to the rule that a defendant who submits to answer, must answer fully. [*Jones* v. *Pugh*] - - - - - - - 470

4. A mortgagee in possession, who becomes overpaid pending a suit to redeem, will be charged with interest on the balance, from the date of the report, and on the rents subsequently received by him, from the respective times when those rents were received. [*Lloyd* v. *Jones*] 491

See PRACTICE, 6.

MORTMAIN.

1. A school was founded for the education of poor children within a certain district. The district was converted into a dock, under a local Act of Parliament, so that the objects of the charity failed. The Court referred it to the Master to approve of a scheme for the application of the funds of the charity, *cy pres*. [*Attorney-General* v. *Glyn*] - - - - - 84

2. A lease of land, already in mortmain, made to a charity, does not require enrolment under 9 Geo. 4, c. 36. [*Ibid.*]

3. Testator, after limiting his Staffordshire estates to his daughter and her sons in strict settlement, recited that he had lately purchased an estate called C. for the purpose of endowing a chapel, but that he had been prevented from

carrying his intention into effect: he then devised the C. estate to trustees, in trust to apply the rents upon such trusts and for such purposes as the persons for the time being in possession of his Staffordshire estates, should, in their discretion, appoint; but he trusted that, out of respect to his memory, they would exercise such power in doing such charitable acts as they knew he would most approve of. Held that both the subject and the object of the trust were clearly pointed out, and that the latter being charitable acts, the trust was void under the Statute of Mortmain. [*Pilkington* v. *Boughey*] 114

MOTION.

1. After answer, the bill was amended and a plea was put in to the amended bill. Held that the original bill having been answered, the pendency of the plea to the amended bill, did not prevent the hearing of a motion for a receiver. [*Thompson* v. *Selby*] - - 100

2. A person, though not a party to a suit, may apply in it by motion (stating his title in the notice of motion), unless a long statement of facts is required to show his title; and then he must apply by petition. [*Jones* v. *Roberts*] 189

MULTIFARIOUSNESS.

A. was a creditor of a firm consisting of M. N. O. P. and others, and also of a firm consisting of M. and N. M. and O. died, and, afterwards, N. P. & Co. became bankrupt. A. then filed a bill on behalf of himself and all the other creditors of M. and O., against the executors and devisees of M. and O., and the assignees of N. P. & Co., for payment of his debt out of the real and personal assets of M. and O. N. demurred to the bill for multifariousness, and, *ore tenus*, because neither the heir of M. nor of O. was a party to the suit. The Court overruled the first ground of demurrer, but allowed the second. [*Brown* v. *Weatherby*] - - 6

NEW ORDERS.

1. Although a plaintiff has amended his bill under an order not expressing that he does not require a further answer, he may (if no answer is filed within the time allowed by the 10th Order of 1833, and he thinks proper to waive the further answer) file a replication under the 14th Order, although that Order applies, in terms, to those cases only in which the order to amend expresses that no further answer is required. [*Hemingway* v. *Fernandes*] - - - - - - - 165

2. Under the 24th Order of August 1841, the Court will allow the plaintiff to enter a memorandum of service of a copy of the bill, without an affidavit stating the nature of the suit, and that no direct relief is sought against the defendant, who has been served. [*Mawhood* v. *Labouchere*] - - - - - 362

3. The 30th Order of August 1841, does not apply to a case in which the equitable interest only is vested, by devise, in A. and B., in trust to sell, although they are empowered to give discharges for the proceeds. [*Turner* v. *Hind*] 414

See DEFENDANT.

NEW TRIAL.

An heir at law is not entitled, as a matter of course, to have a second trial of an issue *devisavit vel non*. [*Wilson* v. *Beddard*] - - - 28

NEW WILL ACT.

See APPOINTMENT.

NEXT FRIEND.

Where the next friend of an infant plaintiff dies, the proper order for the defendant to obtain, is not that the infant may appoint a new next friend within a given time, or that the bill may be dismissed; but that the Master may approve of a new next friend: and four days' notice of the order must be given to the plaintiff's solicitor. [*Glover* v. *Webber*] - - - - - - - 351

NEXT OF KIN.

By a marriage settlement, a fund was settled on the wife, if she should survive her husband, for her life, remainder to their children who, being sons, should attain 21, or, being daughters, should attain that age or marry; and the trustees were directed to apply a portion of the income of the children's expectant shares for their maintenance, and to accumulate the surplus for the benefit of such person or persons as should be entitled thereto, by virtue of the settlement: provided that, if no son should attain 21, nor any daughter should attain that age or marry, then the fund should be in trust for such person or persons as the husband should, by deed or will, appoint: and, in default of appointment, in trust for *his next of kin, according to the Statute of Distributions, and as if he had died intestate*. There was issue of the marriage one son only. The husband died first, without having exercised the power reserved to him: then the son died under 21; and, lastly, the wife died. Held that the fund vested in the son, as his father's next of kin at the father's death, and not in the persons who were the father's next of kin at the son's death. [*Smith* v. *Smith*] 317

NEXT PRESENTATION.

See ADVOWSON.

NOTICE.

See CHARGE OF DEBTS.

NUISANCE.

A bill was filed by five several occupiers of houses in a town, to restrain the erection of a steam-engine which would be a nuisance to each of them. Held that each occupier had a distinct right of suit, and therefore that they could not sue as co-plaintiffs. [*Hudson* v. *Maddison*] - - - - - - - - 416

OBLIGOR AND OBLIGEE.

See EVIDENCE.—LOST INSTRUMENT.

ORDER.

1. Form of order where a case has been sent to a court of law on the argument of a demurrer, and, on the return of the certificate, the case is sent to another court of law. [*Spry* v. *Bromfield*] - - - 75

2. A. and B. each instituted a creditor's suit against C., the executrix of their deceased debtor. A decree having been made in A.'s suit, C. obtained an order staying B.'s suit. C. being in contempt for want of answer in that suit, the order was drawn up in the other suit. [*Turner* v. *Dorgan*] - - - - 504

ORPHANAGE PART.

See CUSTOM OF LONDON.—INFANT.

PAROL AGREEMENT.

See RAILWAY SHARES.

PARTIES.

The 30th Order of August 1841, does not apply to a case in which the equitable interest only is vested, by devise, in A. and B., in trust to sell, although they are empowered to give discharges for the proceeds. [*Turner* v. *Hind*] - - - 414

See EXECUTOR, 3.—MISJOINDER.—PLEA AND PLEADING, 1.

PARTNERS.

See ANSWER, 4.—FRAUD.

PAYMENT OF MONEY INTO COURT.

A. and B. insured, in their joint names, certain leasehold premises which A. had mortgaged to B., and B. paid the premium on the insurance, and the policy was delivered to him. Afterwards the premises were destroyed by fire; and then A. became bankrupt, and his assignees prevailed on the insurance company to pay the money due on the policy to them; and they afterwards paid it into the Bank to the credit of the accountant in bankruptcy. B. filed a bill against the assignees, praying that the money received from the company might be applied in satisfaction of his mortgage-debt. The answer of the assignees tended to impeach the mortgage on the ground of usury. The Court, however, ordered them to pay the amount of the money into Court. [*Rogers* v. *Grazebrooke*] - - - - - - - 557

PETITION.

If a petition is presented under an Act of Parliament by a person who is out of the jurisdiction, the respondent may require security to be given for costs, notwithstanding he has answered the affidavits in support of the petition. [*Ex parte Seidler*] - - - - - - 106

PETITION, SERVICE OF.

A petition presented under 3 & 4 Vict. c. 55, by a tenant for life of settled estates, for leave to drain the estates, ordered to be served on the trustees to preserve contingent remainders, the person beneficially entitled to the first vested estate of inheritance being an infant. [*Ex parte Dering*] - 400

PLAINTIFF.

Plaintiffs filed a supplemental bill for the purpose of bringing before the Court the assignees of a defendant who had become bankrupt. The plaintiffs were fully described in

the original bill, but, in the supplemental bill, their places of residence were omitted. Held, on motion, that they must give security for costs. [*Campbell* v. *Andrews*] 578

See AMENDED BILL.—NEW ORDERS.

PLEA AND PLEADING.

1. A. was a creditor of a firm consisting of M. N. O. P. and others, and also of a firm consisting of M. and N. M. and O. died, and, afterwards, N. P. & Co. became bankrupt. A. then filed a bill on behalf of himself and all the other creditors of M. and O., against the executors and devisees of M. and O., and the assignees of N. P. & Co., for payment of his debt out of the real and personal assets of M. and O. N. demurred to the bill for multifariousness, and, *ore tenus*, because neither the heir of M. nor of O. was a party to the suit. The Court overruled the first ground of demurrer, but allowed the second. [*Brown* v. *Weatherby*] - - 6

2. A bill by legatees, stated that A. and B. (the executors named in the will) proved it: that B. afterwards died, having appointed A. his executor, and A. proved B.'s will. The plaintiffs then filed a bill of revivor and supplement against A., stating that the statement, in the original bill, that A. had proved the first testator's will, was incorrect, and that B. alone had proved it: that A., by proving B.'s will, had become the personal representative of the first testator as well as of B., and that he had possessed certain of the effects of that testator. A. put in a plea, to the bill of revivor and supplement, stating that he had never intermeddled with the original testator's estate, and that, in B.'s lifetime and also since his death, he had renounced probate of the testator's will, and that, therefore, the testator's personal representative was not a party to the suit. Held that the plea was not double; the averment that A. had never intermeddled with the testator's estate, being necessary in order to meet the allegation, in the bill, that he had possessed certain of the testator's effects, and that averment and the other contents of the plea, amounting only to this, namely, that the character of executor of the first testator, was never in A. [*Strickland* v. *Strickland*] - - - 253

3. An incorrect statement in an original bill, is not displaced by a statement to the contrary in a bill of revivor and supplement, filed by the plaintiffs in the suit. The incorrect statement ought to be struck out of the original bill, by amendment. [*Ibid.*]

See ANSWER, 1.—EXECUTOR, 3.—MISJOINDER.—MOTION.

POWER.

A widow, by the settlement on her second marriage, settled 2,300 *l.* which had belonged to her first husband, in trust for her separate use for life; and declared that, subject thereto, the fund should, as and whenever she should think fit or be advised, be settled upon trust for the benefit of her daughter and only child by her first husband and of her daughter's intended husband and child and children, in such manner and for such rights

and interests as should be agreed upon either previous to or after her daughter's marriage, with her consent, and that she (the mother) should have full power to settle the fund, or any part of it, in trust for the immediate benefit of her daughter and her child and children, in manner aforesaid, to take effect either upon such marriage, or upon or immediately after her own death, as she should think fit; but if the daughter should not be married in the mother's lifetime and should survive her, then the fund should be assigned to the daughter at 21 or on marriage, but if the daughter should die in her mother's lifetime without having been married, then the fund should be held in trust for the children of the mother's second marriage. Held that a trust, and not a power, was created in favour of the daughter, her husband and children; but that the mother, if she thought fit, might modify the interests of the *cestuis que trust*, on the daughter marrying with her consent. [*Croft* v. *Adam*] - - - - - - - 639

POWERS TO APPOINT NEW TRUSTEES, AND TO CHANGE SECURITIES.

A marriage contract, in the Portuguese language, between British subjects resident in Lisbon, expressed that the parties were desirous that it should be regulated, made binding and carried into full and complete effect, according to the laws of England. Some years afterwards, the parties, who were then resident in England, filed a bill, praying that a settlement in strict conformity with the contract and containing all the covenants, clauses, powers &c. usually inserted in marriage settlements and deemed necessary and, at the same time, consistent with the substance of the contract, might be executed under the decree of the Court. Held that a power to appoint new trustees as often as should be necessary, and (notwithstanding the contract provided that the settled monies should be invested, as they had been, in the English and French funds) that a power to change those securities for any other of the Government stocks or funds of England or France or for *real securities in Great Britain or Ireland*, were proper powers to be inserted in the settlement. [*Sampayo* v. *Gould*] - - - - 426

PRACTICE.

1. After decree, the plaintiff died; and one of the defendants filed a bill of revivor against his executors, but, for several months, neglected to obtain an order to revive. The Court gave the executors liberty to revive the suit, if the plaintiff in the bill of revivor should not revive it within a week. [*Goodman* v. *Coombes*] - - - - - - - 41

2. A plaintiff having died before the defendant had answered, his representative filed a bill of revivor and supplement, praying that the defendant might answer it and also the original bill. The defendant put in an answer which was intituled as his answer to the original bill of the plaintiff, "since deceased." The answer was ordered to be taken off the file. [*Upton* v. *Sowton*] - - - - - - - - 45

3. An attachment ordered to be issued against a married woman, for dis-

obeying an order in a suit which she had instituted by her next friend. [*Ottway* v. *Wing*] - 90

4. The Court refused to extend the common injunction to stay trial, where the plaintiff in equity was served with notice of trial on the 28th of January, but did not file his bill till the 16th of March, and made the motion on the commission-day of the assizes at which the action was to be tried. [*Stokes* v. *Wilson*] - - - - - - 91

5. After answer, the bill was amended and a plea was put in to the amended bill. Held that the original bill having been answered, the pendency of the plea to the amended bill, did not prevent the hearing of a motion for a receiver. [*Thompson* v. *Selby*] - - 100

6. A., claiming to be heir to a mortgagor, filed a bill to redeem. The answer denied that he was heir. A motion by him, for production of the mortgage-deed, was refused, because he had not established his title. [*Lloyd* v. *Wait*] - - 103

7. Course of proceeding under 6 Anne, c. 18, to compel a lessee *pur autre vie*, to produce the *cestui que vie* to the reversioner. [*In re Lingen*] - - - - - - 104

8. If a petition is presented under an Act of Parliament by a person who is out of the jurisdiction, the respondent may require security to be given for costs, notwithstanding he has answered the affidavits in support of the petition. [*Ex parte Seidler*] - - - - 106

9. After a witness had been examined for the plaintiff, the defendant discovered that he was interested in the result of the suit. The defendant was allowed to issue a new commission for examining the witness and other persons to prove the fact. [*Selway* v. *Chapell*] 113

10. If a defendant who is out of the jurisdiction, has given special authority to a person within the jurisdiction to act as his agent with respect to the property which is the subject of the suit, the Court will order service of the subpœna to appear and answer, on that person, to be good service on the defendant. [*Hobhouse* v. *Courtney*] 140

11. A woman who was sole trustee for sale of real property, married a man who absconded and had not been heard of up to the hearing of the cause. The Court decreed a sale, and that the husband should be declared a trustee within the 11 Geo. 4 & 1 Will. 4, c. 60, s. 19; but declined to appoint a person to convey in his room, under the 8th section, on the ground that he was not the trustee: "last known to have been seised;" there being a joint seisin in him and his wife. Proof of search for a trustee under the 24th section of the stat. 11 Geo. 4 & 1 Will. 4, c. 60, may be given, at the hearing of the cause, by affidavit. [*Moore* v. *Vinten*] 161

12. A person, though not a party to a suit, may apply in it by motion (stating his title in the notice of motion), unless a long statement of facts is required to show his title; and then he must apply by petition. [*Jones* v. *Roberts*] 189

13. Under the 24th Order of August 1841, the Court will allow the plaintiff to enter a memorandum of service of a copy of the bill, without an affidavit stating the nature

of the suit and that no direct relief is sought against the defendant who has been served. [*Mawhood* v. *Labouchere*] - - - - 362

14. Where the next friend of an infant plaintiff dies, the proper order for the defendant to obtain, is not that the infant may appoint a new next friend within a given time, or that the bill may be dismissed; but that the Master may approve of a new next friend: and four days' notice of the order must be given to the plaintiff's solicitor. [*Glover* v. *Webber*] - - - 351

15. The 5th rule of 11 Geo. 4 & 1 Will. 4, c. 36, directs that where a defendant is in custody for a contempt in not answering, the plaintiff shall bring him, by *habeas corpus*, to the bar of the Court within a certain specified time, and that, in case he shall not be brought up within that time, he shall be discharged out of custody. A *habeas corpus* for bringing up a defendant, expired before he was brought up: but he was brought up within the time prescribed, and was then committed to the Fleet. Held that the committal was regular. [*Colley* v. *Candler*] - - - - 408

16. The Court refused to hear a motion to dissolve an injunction, pending a motion, of which the plaintiff had given notice, for production of documents mentioned in a schedule to the answer, no unnecessary delay having taken place in giving notice of the latter motion. [*Storer* v. *Jackson*] - - - - - 503

17. A will was proved in the West Indies, and a duly authenticated copy of it was sent to this country, accompanied by an affidavit, made by one of the attesting witnesses when the will was proved, showing that the will had been executed and attested pursuant to the Statute of Frauds: and that copy was admitted to probate in this country, and was produced in the Court of Chancery, with the affidavit annexed to it. The Vice-Chancellor, however, refused to establish the will, without full proof of its due execution and attestation. [*Rand* v. *Macmahon*] - - - - 553

18. The Court of Chancery will establish a will made and proved in the colonies, on the production of a duly authenticated copy of it, provided the due execution and attestation of the original is proved by the attesting witnesses. [*Ibid.*]

19. The Court will not take the consent of a married woman who is under age, to the payment of money to which she is entitled, to her husband. *Gullin* v. *Gullin*, *ante*, Vol. VII. p. 236, overruled. [*Abraham* v. *Newcombe*] - - - 566

20. Plaintiffs filed a supplemental bill for the purpose of bringing before the Court the assignees of a defendant who had become bankrupt. The plaintiffs were fully described in the original bill, but, in the supplemental bill, their places of residence were omitted. Held, on motion, that they must give security for costs. [*Campbell* v. *Andrews*] 578

See AFFIDAVIT, 2, 3.—ANSWER, 2.—ATTACHMENT.—CONTEMPT.—COSTS, 4.—CROSS-CAUSE.—DEPOSITIONS.—EXCEPTIONS, 2.—NEW ORDERS.—ORDER, 2.—REPORT, 2.

PRESENTATION.

See ADVOWSON.

PRINCIPAL AND AGENT.

See BANKRUPT.—SOLICITOR AND CLIENT.

PRIORITY.

1. Testator gave legacies to trustees, in trust for his daughters for their separate use for their lives, and, after their deaths, for their children. By a codicil, after reciting that he had settled, on his daughters, fortunes which he was satisfied his property would allow of being increased, he gave, to each of them, 500*l.*, which he directed not to be settled, but to be paid to them. By a second codicil, he gave, to his wife, 3,000 *l.* in lieu of 1,000 *l.* which he had given her by his will. His property proved insufficient to pay the legacies in full. Held that the legacies given by the first codicil, were postponed to the legacies given, to the daughters, by the will, and also to the legacy given to the wife, by the second codicil. [*Stammers* v. *Halliley*] - - - - - - - - 42

2. Specific legacies are to be applied in payment of specialty debts, in priority to real estates devised. [*Cornewall* v. *Cornewall*] - 298

PRIVILEGED COMMUNICATION.

See SOLICITOR, 2.

PROCESS.

See ATTACHMENT.—PRACTICE, 15.

PRODUCTION OF DEED.

A., claiming to be heir to a mortgagor, filed a bill to redeem. The answer denied that he was heir. A motion by him, for production of the mortgage-deed, was refused, because he had not established his title. [*Lloyd* v. *Wait*] - 103

See PRACTICE, 16.

PURCHASE (FRAUDULENT).

See SALE UNDER DECREE.

PURCHASE-MONEY.

See WILL, 5.

PURCHASE OF BANKRUPT'S PROPERTY.

See BANKRUPT.

RAILWAY SHARES.

The Court will decree a specific performance of an agreement for the sale of a certain number of shares in a railway company. A parol agreement for the sale of such shares, is binding; for they are neither an interest in or concerning lands, within the 4th section of the Statute of Frauds; nor goods, wares or merchandizes, within the 17th section. [*Duncuft* v. *Albrecht*] - - - - - - 189

RECEIPT FOR PURCHASE-MONEY.

The question whether an executor or trustee who sells an estate, can give a good receipt for the purchase-money, is not a question of conveyance, but of title. The decisions in *Bentham* v. *Wiltshire*, 4 Madd. 44; and *Page* v. *Adam*, 4 Beavan, 269, disapproved of. [*Forbes* v. *Peacock*] - - 528

RECEIVER.

See JURISDICTION, 2.—MOTION.

REDEMPTION.

See INTEREST, 2.

RELEASE.

1. A single woman being entitled to an annuity secured *by bond*, married. Her husband executed a release of the annuity, and died, leaving his wife surviving. Held that, as he could release the security, he could release the annuity, so as to bind his wife. [*Hore* v. *Becher*] - - - - - - 465

2. A. executed a bond to B. and C., conditioned for payment of an annuity of 100 *l.* to D. for life, and assigned an annuity of 120 *l.* for the life of one M. and a policy of insurance for 700 *l.* on M.'s life, to B. and C., upon certain trusts for further securing the annuity of 100 *l.* M. died, and A. died shortly afterwards, having, as was then believed, received the 700 *l.* and applied it to his own use. Shortly afterwards, D., in consideration of 500 *l.*, released A.'s personal representative and B. and C. from the annuity of 100 *l.* and the securities for it. Some years afterwards it was discovered that A. had placed the 700 *l.* in a bank, in the names of B. and C., where it still remained. Held that the release, having been executed under a mistake, was inoperative, and that the 700 *l.* remained impressed with the trusts for securing the annuity of 100 *l.* [*Ibid.*]

See RELEASE OF DEBTS.

RELEASE OF DEBTS.

Testator bequeathed his residuary estate in trust for his son and daughter equally, and declared that certain sums which he had lent to his son, should be deducted from his share of the residue, and that certain sums which he had lent to C. W., his daughter's husband, on bonds, *should be taken and allowed in account as part of her share*; *and, if the balance should appear to be against* C. W., *the trustees were to refrain from putting the bonds in force against him*, and to take a security from him for payment of the balance by instalments. The daughter died in the testator's lifetime. Held, nevertheless, that C. W. was released from the debts due from him, and was answerable only for the excess (if any) of those debts beyond the amount of a moiety of the residue. [*South* v. *Williams*] 566

See RELEASE.

REMAINDER-MAN.

See TENANT FOR LIFE.

REMOTENESS.

1. Testator gave his real and personal estates to trustees, and directed them to invest his personal estate in the purchase of land, and to pay the rents, subject to certain annuities, to his son, for life; and, in case his son should die, leaving behind him no legitimate issue, then he directed the trustees to pay the rents to his, the testator's, widow for life; but in case his son should die leaving behind him legitimate issue, then, at the end of six months after the eldest male

child *then living* of his son, should have attained *twenty-five*, or, in default of male issue, the eldest female child then living of his son, should have attained 21, to convey all the estates to the eldest male child, or, in default of male issue, to the eldest female child and *to his or her heirs of his or her body lawfully begotten, absolutely for ever.* The testator then (in case his son should die during the minority of such eldest male or female child) provided for their maintenance out of the rents until he or she should attain the respective ages before mentioned, and declared that, in case his son should not die during such minority, his estates should continue on the trusts aforesaid until six months after his son's death, and then pass to his son's eldest male or female child in manner before expressed; and in case his son should die leaving no legitimate issue, then that the trustees should, after the death of the testator's wife, convey the estates to certain other persons. The testator's son married, and had a son born after the testator's death. The Court held the trust for the grandson not to be void for remoteness; and the grandson having survived his father and attained 21 (but being under 25), and all the annuitants being dead, ordered the estates to be conveyed to him. [*Jackson* v. *Marjoribanks*] - 93

2. Testator gave the residue of his personal estate unto and among all and every the children, sons and daughters of his daughter Elizabeth, in equal shares and proportions, as and when they should attain their respective ages of 22 years. Held that the children of the testator's daughter living at the testator's death, were the only objects of the bequest; and, consequently, that it was not void for remoteness. [*Elliott* v. *Elliott*] 276

3. Testator bequeathed 3,000*l.* to trustees, in trust, after certain life interests, "for all the children of T. F. (except Thomas the younger, William, Rebecca, Elizabeth, Sarah and Frances), equally to be divided between them, share and share alike; the share or respective shares of such children to become vested interests in and to be paid, assigned and transferred to them respectively, as and when they should attain their respective ages of 25 years:" provided that, if any of them died, before their shares became vested and payable, leaving issue, their shares should go to their issue: and the trustees were directed, in the meantime and until the shares of the children should become payable, assignable and transferable to them, to apply the income for their maintenance. The testator also bequeathed 6,000*l.* to the same trustees, in trust, after certain life interests: "for all and every the children of T. F. born or hereafter to be born, equally to be divided between them, share and share alike, and to be paid, assigned and transferred to them at their respective ages of 25 years, and to be subject to the like descent to the lawful issue of such of them as shall die under the said age of 25 years, and under the like conditions and restrictions, and with the like power to apply the interest thereof for their respective maintenance, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are here-

inbefore contained in relation to the several legacies hereinbefore given to or in trust for the said children respectively:" provided that in case any person to or in trust for whom any bequest, to take effect in remainder or reversion, or upon any contingency, was made, should sell or incumber his interest under such bequest before the same should take effect in possession, all the bequests in favour of that person should become void. By a codicil the testator revoked a power which he had given, by his will, to the trustees, to apply, for the advancement of the legatees, the whole or part of the capital of their legacies, before they attained 25, and directed that the legacies should vest in and be payable, assignable and transferable to them as if no such power were contained in his will. Held that the trusts declared of both sums, were void for remoteness. [*Comport* v. *Austen*] - - - - - - - - - 218

RENTS (INTERMEDIATE).

See INTERMEDIATE RENTS.

REPLICATION.

See AMENDED BILL.

REPORT.

1. Plaintiff served defendant with an order confirming a report *nisi*: and, on the eighth day after exclusive of the day of service, he applied for the registrar's certificate of no cause shown, but which the registrar declined to give without the production of counsel's brief on a motion to make the order absolute, which (it was said) could not be made until the then next seal. On the ninth day, the defendant filed exceptions to the report. Held that the exceptions were regularly filed. [*Plunkett* v. *Lewis*] - - - 279

2. If the Court, on hearing exceptions to a report, considers the evidence produced before the Master not to be sufficient to warrant his finding, it will not allow the exceptions simply; but will allow the exceptions, and refer it back to the Master to review his report: thereby giving the unsuccessful party an opportunity of laying further evidence before the Master. [*Daubeny* v. *Coghlan*] - - 507

RESIDUARY LEGATEE.

See COSTS, 1.

RESIDUE.

1. The word "legacy" in 3 & 4 Will. 4, c. 27, s. 40, includes a residue or share of a residue: *semble*. [*Christian* v. *Devereux*] 264

2. An executor is entitled to a residue or share of a residue bequeathed to him, although he has not proved the will. [*Ibid.*]

RESTRAINT OF ALIENATION.

See ALIENATION.

REVERSIONARY INTEREST.

See RELEASE, 1.

REVIVOR.

1. After decree, the plaintiff died; and one of the defendants filed a bill of revivor against his executors, but, for several months, neglected to obtain an order to revive. The

Court gave the executors liberty to revive the suit, if the plaintiff in the bill of revivor should not revive it within a week. [*Goodman* v. *Coombes*] - - - - - - 41

2. If a defendant dies, having appointed two or more executors, and all of them do not prove the will, it is sufficient for the plaintiffs to revive the suit against those who prove. [*Strickland* v. *Strickland*] - - - - - - - - 463

See PLEA AND PLEADING, 2.

REVOCATION.

A single lady having, under a will, a general power of appointment over a fund, made a voluntary appointment of it to trustees, in trust for her separate use, for life; remainder for any husband whom she might marry, for life; remainder for her children by any husband or husbands whomsoever. A few months afterwards, she, being still unmarried, revoked the appointment (although she had not reserved to herself any power to do so), and made another voluntary appointment of the fund, to other trustees, in trust as she should appoint by deed or will. She then married; and, *afterwards*, by virtue of the power reserved to her by the last deed, she executed another voluntary deed, by which she declared that the trustees of the prior deed should stand possessed of the fund in trust as she and her husband should appoint, and, in default, in trust for her husband and herself for their lives respectively, remainder for their children. The fund still remained in the names of the trustees of the will. The Court, in a suit by the wife and the last-mentioned trustees, against the husband, the trustees of the will and the trustees of the first-mentioned deed, decreed (with the husband's concurrence) the trustees of the will to transfer the fund to the trustees of the last deed upon the trusts thereof. *Sloane* v. *Cadogan* observed upon. [*Beatson* v. *Beatson*] - - - - - - - 281

See WILL, 5.

SALE.

See INFANT HEIR.

SALE UNDER DECREE.

A party to a suit, who was also a solicitor, and had the conduct of a sale decreed by the Court, purchased at the sale, under a feigned name. The Court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which the party had purchased it, and, if there should be no higher bidder, the party to be held to his purchase. [*Sidny* v. *Ranger*] - - - 118

SCANDAL.

1. A defendant, though he is in contempt for want of answer, may except to the bill for scandal, but not for impertinence. [*Everett* v. *Prythergch*] - - - - - 363

2. A creditor filed a bill against the debtor's executor, stating, first, that the defendant was a person of bad character, of drunken habits and violent behaviour, and then adducing instances in support of that statement; and praying that the assets might be administered under the direction of the Court, and for an injunction and receiver. Held that

the general statement and the instances were relevant to the relief asked, and therefore were not scandalous. [*Everett* v. *Prythergch*] - - - - - - - 365

See EXCEPTIONS, 2.

SCOTCH DEED.

A deed in the Scotch form, made between parties, some of whom were domiciled in Scotland, and the others in England, construed, partly according to the law of Scotland, and partly according to the law of England; that is to say, so far as it concerned the Scotch parties, according to the Scotch law, and so far as it concerned the English parties, according to the English law. [*Duncan* v. *Campbell*] - - - - - - - 616

SECURITY FOR COSTS.

See COSTS, 2.—PRACTICE, 8. 20.

SECURITIES (CHANGE OF).

See MARRIAGE ARTICLES.

SEPARATION.

See SETTLEMENT.

SERVICE OF PETITION.

See PETITION, SERVICE OF.

SETTLEMENT.

Mrs. D., being entitled to 3,000 *l.* in reversion expectant on her aunt's death, the aunt consented, at the request of Mr. and Mrs. D., to relinquish her life interest in 2,000 *l.*, part of the 3,000 *l.*, in consideration of Mr. D. agreeing that the remainder of the 3,000 *l.*, when payable, should be paid to trustees for his wife's separate use, and that he would, immediately, settle 2,000 *l.* out of his own funds, and also the first-mentioned 2,000 *l.*, so as to provide *for the maintenance of himself and his wife*, and the survivor of them. The agreement was carried into effect by a deed which directed the trustees to pay the interest, of the two sums of 2,000 *l.* *to Mr. and Mrs. D. during their joint lives*, and to stand possessed of the principal for the survivor of them. Mr. D. afterwards separated from his wife in consequence of her having committed adultery. Held that he was entitled to receive the whole of the interest of the trust fund, and was not bound to maintain his wife out of it, notwithstanding she was destitute of the means of support. [*Duncan* v. *Campbell*] - - 616

See MARRIAGE ARTICLES.

SHIPOWNERS (LIABILITY OF).

The Act of 53 Geo. 3, c. 159, for limiting the responsibility of shipowners in certain cases, requires an affidavit of certain facts to be annexed to bills filed under it. Held that it was no objection to such an affidavit, that it was sworn four days before the bill was filed, the deponents living at Sunderland. [*Walker* v. *Fletcher*] - - 420

SIGNATURE.

If a testator, who is unable, from illness, to sign his will, has his hand guided in making his mark, it is a sufficient signature within the Statute of Frauds. [*Wilson* v. *Beddard*] - - - - - - - - 28

SOLICITOR.

1. A tenant for life of settled estates, obtained an Act of Parliament for selling the estates, and investing the proceeds, under the direction of the Court, in the purchase of other lands to be settled to the same uses. After the estates had been sold, and the money paid into Court, the tenant for life fraudulently obtained an order, under which part of the money was paid out to him. Messrs. B., G. and C., solicitors and copartners, acted as the solicitors of the tenant for life, in obtaining the order, and in every other proceeding under the Act. B. was aware of the fraud; but G. and C. were wholly ignorant of it. Held, nevertheless, in a suit instituted by the remainder-man after the death of the tenant for life, that G. and C. as well as B., and the estate of the tenant for life, and all the other parties to the transaction, were jointly and severally liable to make good the money. [*Brydges* v. *Branfill*] - - 369

2. A solicitor invested his client's money on a mortgage, and, by the client's desire, took the mortgage in his own name, without any trust being declared by the deed. In a suit by a judgment creditor of the mortgagor, to redeem, against the solicitor and the mortgagor (who was out of the jurisdiction), held that the solicitor was privileged from disclosing the name of his client, and also the particulars of other mortgages of the property, which had been taken, by other clients of the solicitor, in their own names. Held, also, that the case was an exception to the rule that a defendant who submits to answer, must answer fully. [*Jones* v. *Pugh*] - - - - - - - - 470

See TAXATION.—VENDOR AND PURCHASER.

SOLICITOR AND CLIENT.

In a suit by a principal against his steward and agent, the decree, in conformity to the prayer of the bill, directed an account to be taken of rents, profits and timber-money received, by the defendant on the plaintiff's account; and also directed the Master, in taking the accounts, to make to the parties all just allowances. The defendant was a solicitor, and had acted, as such, for the plaintiff, during his stewardship; and bills of costs were due to him from the plaintiff. The Master, at the plaintiff's request, taxed the bills, and, in taking the accounts under the decree, included the reduced amounts of them amongst the just allowances to which the plaintiff was entitled. The plaintiff excepted to the report on that account; and the Court allowed the exceptions. [*Jolliffe* v. *Hector*] - - - - - - 398

See TAXATION.

SPECIALTY DEBTS.

See ADMINISTRATION.

SPECIFICLEG ACY.

Testator bequeathed, amongst other stock-legacies, 30,000 *l.* consols to the Provost and Fellows of Queen's College, to be by them expended, within three years after his death, in the purchase of such books for the use of, and to be added to the library of the College, as the Provost and Fellows for the time being,

should, in their discretion, think fit; and, in a subsequent paragraph, he directed that if, at his decease, he should not have a sufficiency of stock standing in his name to answer the several stock-legacies aforesaid, his executor should purchase and make up the deficiency out of his residuary estate. The stock standing in the testator's name at his death, was sufficient to answer the bequest to the College. Held that that bequest was specific. [*Queen's College* v. *Sutton*] - - - - 521

See ADMINISTRATION, 2.—LONG ANNUITIES.

SPECIFIC PERFORMANCE.

See AGREEMENT.

STAMP ON LETTERS OF ADMINISTRATION.

A. claimed a fund in Court as his father's administrator, but the letters of administration were not stamped to a sufficient amount. The Court refused to grant him a stop-order until he had procured the letters to be sufficiently stamped. [*Christian* v. *Devereux*] - 264

STATUTES.

21 James 1, c. 16.

See STATUTE OF LIMITATIONS, 1.

6 Anne, c. 18.

See PRACTICE, 7.

5 Geo. 2, c. 7.

See ASSETS.

39 & 40 Geo. 3, c. 98.

See THELLUSSON ACT.

52 Geo. 3, c. 101.

See CHARITY, 4.—JURISDICTION.

53 Geo. 3, c. 159.

See AFFIDAVIT, 3.

9 Geo. 4, c. 14.

See STATUTE OF LIMITATIONS, 1.

9 Geo. 4, c. 36.

See MORTMAIN, 2.

11 Geo. 4 and 1 Will. 4, c. 36.

See CONTEMPT, 2.

11 Geo. 4 and 1 Will. 4, c. 60.

See HEIR, 2.—INFANT HEIR.—TRUSTEE, 1.

3 & 4 Will. 4, c. 27.

See AGENT.—RESIDUE, 1.

4 & 5 Will. 4, c. 23.

See HEIR, 2.

7 Will. 4 and 1 Vict. c. 26.

See APPOINTMENT.—WILL, 5.

1 & 2 Vict. c. 110.

See INSOLVENT, 2.

3 & 4 Vict. c. 55.

See PETITION, SERVICE OF.

STATUTE OF FRAUDS.

See RAILWAY SHARES.—SIGNATURE.

STATUTE OF LIMITATIONS.

1. In 1835, A. filed a creditor's bill, against the administrator of his debtor, founded on a debt due on a promissory note, but in respect of which no payment of either principal or interest had been made since 1823. In 1832 the administrator, on the citation of a third

person, signed and exhibited, in the Ecclesiastical Court, an inventory and account of the late debtor's assets and debts, in which A.'s debt was entered. Held that that entry was a sufficient acknowledgment, within Lord Tenterden's Act (9 Geo. 4, c. 14), to take the debt out of the Statute of Limitations (21 Jas. 1, c. 16). [*Smith* v. *Poole*] 17

2. An executor who had possessed assets sufficient to pay a legacy, died leaving it unpaid, and having charged his real estates with his debts. The right to sue for the legacy as such, was barred by lapse of time. Held that it could not be claimed under the charge of debts. [*Piggott* v. *Jefferson*] - - 26

3. The word "legacy" in 3 & 4 Will. 4, c. 27, s. 40, includes a residue or share of a residue; *semble*. [*Christian* v. *Devereux*] - 264

4. A testator who died in 1795, devised his real estates to trustees to sell, and out of the interest of the proceeds, and out of the rents of the estates until they should be sold, to pay certain annuities. No payment had been made in respect of any of the annuities for more than 20 years before the bill was filed; but the trustees entered into possession of the estates on the testator's death, and the surviving trustee continued in possession until about 11 years prior to the filing of the bill. Held that the plaintiff's right to the annuities was not barred by the Statute of Limitations. [*Ward* v. *Arch*] - 472

See AGENT.

STOP ORDER.

A. claimed a fund in Court, as his father's administrator, but the letters of administration were not stamped to a sufficient amount. The Court refused to grant him a stop-order until he had procured the letters to be sufficiently stamped. [*Christian* v. *Devereux*] - 264

SUBPŒNA.

If a defendant who is out of the jurisdiction, has given special authority to a person within the jurisdiction to act as his agent with respect to the property which is the subject of the suit, the Court will order service of the subpœna to appear and answer, on that person, to be good service on the defendant. [*Hobhouse* v. *Courtney*] - 140

SUBSTITUTION OF SERVICE.

See SUBPŒNA

SUPPLEMENTAL BILL.

See PRACTICE, 20.

SURVIVORSHIP.

1. Testator gave 800 *l.* to the four children of H. R., to be divided into equal shares, and paid to them at 21, and the interest of their shares to be paid, to their parents, in the meantime: and, in case of either of the legatees dying under 21, then his, her or their shares were to be equally divided amongst the survivors. Two of the children died under 21 in the testator's lifetime. Held that the two survivors were entitled to the *original* share only of the child who died last. [*Rickett* v. *Guillemard*] - - 88

2. By the custom of London, if a freeman dies intestate leaving several children, and one of them dies an

infant, his orphanage-share survives to his brothers and sisters, and if another child dies an infant, his accrued, as well as his original share survives in like manner: and the accumulations accompany the shares from which they arose. [*Bruin* v. *Knott*] - - - 436

3. A book produced from the muniment-room of the corporation of London, was held to be receivable as evidence of the custom. [*Ibid.*]

TAXATION.

If a person out of the jurisdiction, petitions for the taxation of his solicitor's bill, he must give security for the costs of the taxation, and also for the balance that may be found due from him. [*Anon.*] 262

See FEES TO COUNSEL.—SOLICITOR AND CLIENT.

TENANCY IN COMMON.

Testator gave one-fourth of his residuary estate to trustees in trust for his wife for life, and after her decease in trust for and to be equally divided amongst all his children who should be then living and the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living. Two children and two grandchildren, the issue of a deceased child of the testator, were living at the death of the widow. Held that the two grandchildren took *as between themselves* as joint tenants and not as tenants in common. [*Bridge* v. *Yates*] - - - 645

TENANT FOR LIFE AND REMAINDER-MAN.

Estates were devised to A. in fee, in trust to settle them on B. for life, remainder to C. for life, *without impeachment of waste*, remainder to C.'s first and other sons in tail. Soon after the testator's death, A. with the consent of B. & C., cut and sold some timber on the estates which was going to decay, and invested the proceeds in consols. Afterwards a suit was instituted by C. against A., B. and C.'s infant eldest son, in which the stock was ordered to be transferred into Court. The Court having ascertained the circumstances under which the timber had been cut, ordered the dividends of the stock to be paid to B. for life; and, afterwards, B. having died, the capital to be transferred to C. [*Waldo* v. *Waldo*] 107

THELLUSSON ACT,

(39 & 40 Geo. 3, c. 98).

Testator, after devising his estates in strict settlement, directed that, in case he should not erect a mansion-house on his estates, in his lifetime, his trustees should, *forthwith after his death*, erect the same according to such plan as he should approve of in his lifetime; or, if he should die before such plan should be prepared and completed, then according to such plan as his trustees, with the consent of the person, for the time being beneficially entitled to the immediate freehold of his estates, should think proper to adopt: and he gave 20,000 *l.* to the trustees, to be applied in erecting the house, and, *in the meantime*, to be laid out in the funds

and the dividends to be accumulated; and the accumulations, as well as the original fund, to be applied in erecting the house, and the surplus (if any) to be laid out in the purchase of lands to be settled to the same uses as the devised estates. Owing to opposition on the part of the tenant for life, the trustees did not begin to build the house until more than 21 years after the testator's death; and they invested the 20,000*l.* and accumulated the income of it during the whole of the interval. Held that the direction for accumulation was not within the Thellusson Act, but that the whole of the accumulated fund was applicable to the purposes directed by the will. [*Lombe* v. *Stoughton*] - - 304

TIMBER.

Estates were devised to A. in fee, in trust to settle them on B. for life, remainder to C. for life, *without impeachment of waste*, remainder to C.'s first and other sons in tail. Soon after the testator's death, A., with the consent of B. and C., cut and sold some timber on the estates which was going to decay, and invested the proceeds in consols. Afterwards a suit was instituted by C. against A., B. and C.'s infant eldest son, in which the stock was ordered to be transferred into Court. The Court having ascertained the circumstances under which the timber had been cut, ordered the dividends of the stock to be paid to B. for life; and, afterwards, B. having died, the capital to be transferred to C. [*Waldo* v. *Waldo*] - - - 107

TITLE.

The question whether an executor or trustee, who sells an estate, can give a good receipt for the purchase-money, is not a question of conveyance, but of title. The decisions in *Bentham* v. *Wiltshire*, 4 Madd. 44; and *Page* v. *Adam*, 4 Beavan, 269, disapproved of. [*Forbes* v. *Peacock*] - - 528

TRIAL.

See PRACTICE, 4.

TRUST.

1. Testator bequeathed 3,000*l.* to trustees, in trust, after certain life interests, "for all the children of T. F. (except Thomas the younger, William, Rebecca, Elizabeth, Sarah and Frances), equally to be divided between them, share and share alike; the share or respective shares of such children to become vested interests in and to be paid, assigned and transferred to them respectively, as and when they should attain their respective ages of twenty-five years:" provided that, if any of them died, before their shares became vested and payable, leaving issue, their shares should go to their issue: and the trustees were directed, in the meantime and until the shares of the children should become payable, assignable and transferable to them, to apply the income for their maintenance. The testator also bequeathed 6,000*l.* to the same trustees, in trust, after certain life interests: "for all and every the children of T. F. born or hereafter to be born, equally to be divided between them, share and share alike, and to be paid,

assigned and transferred to them at their respective ages of twenty-five years, and to be subject to the like descent to the lawful issue of such of them as shall die under the said age of twenty-five years, and under the like conditions and restrictions, and with the like power to apply the interest thereof for their repective maintenance, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are hereinbefore contained in relation to the several legacies hereinbefore given to or in trust for the said children respectively:" provided that in case any person to or in trust for whom any bequest, to take effect in remainder or reversion, or upon any contingency, was made, should sell or incumber his interest under such bequest before the same should take effect in possession, all the bequests in favour of that person should become void. By a codicil the testator revoked a power which he had given, by his will, to the trustees, to apply, for the advancement of the legatees, the whole or part of the capital of their legacies, before they attained twenty-five, and directed that the legacies should vest in and be payable, assignable and transferable to them as if no such power were contained in his will. Held that the trusts declared of both sums, were void for remoteness. [*Comport* v. *Austen*] - - - - - - - - 218

2. A widow, by the settlement on her second marriage, settled 2,300*l.* which had belonged to her first husband, in trust for her separate use for life; and declared that, subject thereto, the fund should, as and whenever she should think fit or be advised, be settled upon trust for the benefit of her daughter and only child by her first husband, and of her daughter's intended husband and child and children, in such manner and for such rights and interests as should be agreed upon either previous to or after her daughter's marriage, with her consent, and that she (the mother) should have full power to settle the fund or any part of it in trust for the immediate benefit of her daughter and her child and children in manner aforesaid, to take effect either upon such marriage, or upon or immediately after her own death as she should think fit; but if the daughter should not be married in the mother's lifetime and should survive her, then the fund should be assigned to the daughter at twenty-one or on marriage, but if the daughter should die in the mother's lifetime without having been married, then the fund should be held in trust for the children of the mother's second marriage. Held that a trust, and not a power, was created in favour of the daughter, her husband and children; but that the mother, if she thought fit, might modify the interests of the *cestuis que trust* on the daughter marrying with her consent. [*Croft* v. *Adam*] 639

See CHARITY, 3.—REMOTENESS, 1, 2.

TRUSTEE.

1. A woman who was sole trustee for sale of real property, married a man who absconded and had not been heard of up to the hearing of the cause. The Court decreed a sale, and that the husband should be declared a trustee within the 11 Geo. 4 & 1 Will. 4, c. 60, s. 19;

but declined to appoint a person to convey in his room, under the 8th section, on the ground that he was not the trustee: "last known to have been seised:" there being a joint seisin in him and his wife. Proof of search for a trustee under the 24th section of the stat. 11 Geo. 4 & 1 Will. 4, c. 60, may be given, at the hearing of the cause, by affidavit. [*Moore* v. *Vinten*] - - - - - - - - 161

2. On a petition for the appointment of new trustees of a charity, the Court directed that, in the deed appointing the new trustees, a power should be inserted, for appointing new trustees in future. [*In re* 52 Geo. 3, c. 101] - 262

See INFANT HEIR.——MARRIAGE ARTICLES.—TITLE.

TRUSTEE AND CESTUI QUE TRUST.

A testator who died in 1795, devised his real estates to trustees to sell, and out of the interest of the proceeds, and out of the rents of the estates until they should be sold, to pay certain annuities. No payment had been made in respect of any of the annuities for more than 20 years before the bill was filed; but the trustees entered into possession of the estates on the testator's death, and the surviving trustee continued in possession until about 11 years prior to the filing of the bill. Held that the plaintiff's right to the annuities was not barred by the Statute of Limitations. [*Ward* v. *Arch*] - 472

TRUST-ESTATE.

Testator gave all his property whatsoever and wheresoever the same might be at his decease, to his wife, for her absolute use for ever. Held that an estate vested in the testator as a trustee, passed by the devise. [*Lindsell* v. *Thacker*] 178

VENDOR AND PURCHASER.

1. A party to a suit, who was also a solicitor, and had the conduct of a sale decreed by the Court, purchased at the sale, under a feigned name. The Court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which the party had purchased it, and, if there should be no higher bidder, the party to be held to his purchase. [*Sidny* v. *Ranger*] - - - 118

2. Where a testator has charged his real estate with his debts, and the executor proceeds to sell the estate, the purchaser has a right to ask him, whether all the debts are paid or not, and, if he declines to answer, the purchaser will be considered to have had notice that all the debts have been paid, and will be answerable for the application of his purchase-money. [*Forbes* v. *Peacock*] - - - 528

3. The question whether an executor or trustee who sells an estate can give a good receipt for the purchase-money, is not a question of conveyance but of title. The decisions in *Bentham* v. *Wiltshire*, 4 Madd. 44, and *Page* v. *Adam*, 4 Beav. 269, disapproved of. [*Ibid.*]

4. A defendant, a purchaser, demurred to a bill for specific performance, and his demurrer was overruled. He then asked for a case to be sent to a court of law, which was granted, and the opinion of the Judges was against him. Ultimately, however, the bill was dis-

missed with costs. Held that the defendant was entitled to his costs at law as well as in equity. [*Forbes* v. *Peacock*] - - 528

VESTING.

See WILL, 3.

VESTING ORDER.

See INSOLVENT.

VOLUNTARY SETTLEMENT.

A single lady having, under a will, a general power of appointment over a fund, made a voluntary appointment of it to trustees, in trust for her separate use, for life; remainder for any husband whom she might marry, for life; remainder for her children by any husband or husbands whomsoever. A few months afterwards, she, being still unmarried, revoked the appointment (although she had not reserved to herself any power to do so), and made another voluntary appointment of the fund, to other trustees, in trust as she should appoint by deed or will. She then married; and, *afterwards*, by virtue of the power reserved to her by the last deed, she executed another voluntary deed, by which she declared that the trustees of the prior deed should stand possessed of the fund in trust as she and her husband should appoint, and, in default, in trust for her husband and herself for their lives successively, remainder for their children. The fund still remained in the names of the trustees of the will. The Court, in a suit by the wife and the last-mentioned trustees, against the husband, the trustees of the will and the trustees of the first-mentioned deed, decreed, with the husband's concurrence, the trustees of the will to transfer the fund to the trustees of the last deed upon the trusts thereof. *Sloane* v. *Cadogan*, observed upon. [*Beatson* v. *Beatson*] - - - - - - 281

VOLUNTEER.

See REVOCATION.

WEST INDIA ESTATE.

Notwithstanding West India estates are made legal assets by 5 Geo. 2, c. 7, s. 4, they may be devised so as to make them equitable assets. [*Charlton* v. *Wright*] - - 274

WILL.

1. Testator bequeathed to J. W. 1,000 *l.*; to his sister, M. W. 200 *l.*; to their mother 200 *l.*; and to the three aunts of J. W. and his sister M. W. 100 *l.* each. Held that the last bequest included the aunts, but not the sister. [*Trail* v. *Kibblewhite*] - - - - - 5

2. Testator gave his real and personal estates to trustees, and directed them to invest his personal estate in the purchase of land, and to pay the rents, subject to certain annuities, to his son, for life; and, in case his son should die, leaving behind him no legitimate issue, then he directed the trustees to pay the rents to his, the testator's, widow for life; but in case his son should die leaving behind him legitimate issue, then, at the end of six months after the eldest male child *then living* of his son, should have attained *twenty-five*, or, in default of male issue, the eldest female child then living of his son, should have attained

twenty-one, to convey all the estates to the eldest male child, or, in default of male issue, to the eldest female child and *to his or her heirs of his or her body lawfully begotten, absolutely for ever.* The testator then (in case his son should die during the minority of such eldest male or female child) provided for their maintenance out of the rents until he or she should attain the respective ages before mentioned, and declared that, in case his son should not die during such minority, his estates should continue on the trusts aforesaid until six months after his son's death, and then pass to his son's eldest male or female child in manner before expressed; and in case his son should die leaving no legitimate issue, then that the trustees should, after the death of the testator's wife, convey the estates to certain other persons. The testator's son married, and had a son born after the testator's death. The Court held the trust for the grandson not to be void for remoteness; and the grandson having survived his father and attained twenty-one (but being under twenty-five), and all the annuitants being dead, ordered the estates to be conveyed to him. [*Jackson* v. *Marjoribanks*] 93

3. Testatrix gave an annuity of 50*l.* to her son in law, for his life, provided he remained unmarried, but if he should marry, the annuity to cease; and, after his death or second marriage, whichever should first happen, she gave 1,000*l.* to be equally divided between her brother and sisters: and, if they should not all be then living, she gave the share of him, her or them so dying to be equally divided between them, her surviving brother and sisters. The testatrix's brother and sisters all died in her son in law's lifetime, and he died unmarried. Held that the brother and sisters took a vested interest in the 1,000*l.* as tenants in common. [*Peters* v. *Dipple*] - - - 101

4. Testatrix bequeathed 1,300*l.* to trustees in trust, as to one-third, for such of *the children* of A. S. then deceased, as should be living at the testatrix's death; and in trust, as to the remaining two thirds for the children of S. T. and T. P. living at the same time. S. T. had grandchildren, but no child living either at the date of the will or at the testatrix's death: but A. S. and T. P. had, each of them, children living at those times. Held that the grandchildren of S. T. could not claim the benefit of the trust. [*Moor* v. *Raisbeck.*] 123

5. Testatrix devised all her freehold messuages &c. in S. to trustees in trust to sell and stand possessed of the proceeds in trust for A., and gave the residue of her personal estate, to the trustees, in trust for B. After the date of her will she sold the houses and conveyed them to the purchaser, and he deposited the conveyance and title-deeds thereof with her, to secure part of the purchase-money. Held that the security and the money due on it did not pass, under 7 Will. 4 and 1 Vict. c. 26 (the late Will Act), to the trustees in trust for A., but to the trustees in trust for B. [*Ibid.*]

6. Testator directed his residuary real and personal estate to be divided by his trustees, in such shares and at such times as they should think

proper, amongst his nephews, A., B. and C., and his other nephews and nieces, sons and daughters of his late sisters T. and H., who should be living at his decease, and the children of any other such nephews and nieces who, having died in his lifetime, had left issue. There were several children, and children of deceased children, both of T. and of H., living at the testator's death. The trustees not being able to agree as to the division of the property, the Court ordered it to be divided amongst the children, and the children of the deceased children of T. and H., *per capita*. [*Tomlin* v. *Hatfeild*] 167

7. Testator devised his real estates to trustees, in trust to sell as soon as conveniently might be after his decease, and as to the proceeds, together with the intermediate rents, after payment of the testator's funeral and testamentary expenses, debts and legacies, to pay one moiety to his nephew, and to invest the other moiety in the funds, in trust for his nephew, for life, and, after his death, for his children. The real estates were not sold until some years after the testator's death. Held that rents accrued in the meantime, ought not to be invested for the benefit of the nephew and his children, but that the nephew was entitled to them. [*Vigor* v. *Harwood*] - - 172

8. A will contained the following clause: "I recommend that the house and premises may be disposed of as soon as possible, and, after paying all just debts, may be equally divided, share and share alike, Mrs. M., Mr. and Mrs. W. and children, likewise H. H." Held that Mrs. W. was entitled to an equal share of the proceeds of the house and premises, as tenant in common with her husband and her children living at the testator's death, and with Mrs. M. and H. H. [*Paine* v. *Wagner*] - 184

9. Testator gave a freehold house to his wife *for her sole use and benefit*, and another freehold house to her *for her life*; and he also gave to her all his household goods, plate &c.: but, if she married again, the whole of the above property was *to become the property* of his daughter: and, in case his wife should remain unmarried, then he gave the second mentioned house to his daughter, for her life, and to her children, after his wife's death: "I also appoint my wife, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease." Held that the fee-simple in the first-mentioned house, passed to the wife. [*Day* v. *Daveron*] - 200

10. By a marriage settlement, a fund was settled on the wife, if she should survive her husband, for her life, remainder to their children who, being sons, should attain twenty-one, or being daughters, should attain that age or marry; and the trustees were directed to apply a portion of the income of the children's expectant shares for their maintenance, and to accumulate the surplus for the benefit of such person or persons as should be entitled thereto, by virtue of the settlement: provided that, if no son should attain twenty-one, nor any daughter should attain that age or marry, then the fund should be in trust for such person or per-

sons as the husband should, by deed or will, appoint; and, in default of appointment, in trust for *his next of kin, according to the Statute of Distributions, and as if he had died intestate.* There was issue of the marriage one son only. The husband died first, without having exercised the power reserved to him: then the son died under twenty-one; and, lastly, the wife died. Held that the fund vested in the son, as his father's next of kin at the father's death, and not in the persons who were the father's next of kin at the son's death. [*Smith* v. *Smith*] 317

11. Testator devised a real estate to his daughter for life, and then to be sold and the proceeds divided amongst her children. One of her children died in her lifetime, having devised his share of the estate to his son. Held that the deceased child took his share of the estate as personalty in reversion expectant on his mother's death; and, consequently, that his executrix, and not his son, was entitled to it. [*Elliott* v. *Fisher*] - - - 505

12. Testator bequeathed 5,000 *l.* in trust for all and every the child and children of his niece, C. A., *and of his nephew, the late James C.*, to be divided amongst them, if more than one, share and share alike, and, if there should be but one such child, then in trust for such only child: the shares of sons to be paid to them at twenty-one, and the shares of daughters at that age or on their marriage. The testator never having had a nephew named James C. who had died leaving issue, the children of his late nephew Henry C. (who was the only one of his nephews who had left issue) claimed to be interested under the bequest: upon which the Master was directed to inquire what persons were meant by the testator. It appeared (amongst other things) from the evidence before the Master, that the testator had had four nephews surnamed C.: that two of them were named James, and another Henry: that one James died forty years ago, and the other, about sixteen years before the date of the will, and that Henry died about ten years before the date of the will, and was the only nephew of the testator who left issue: and the Master found that *his* children were the persons intended. The Court, however, on hearing exceptions to the report, held that the finding was not warranted by the evidence, and referred it back to the Master to review his report. [*Daubeny* v. *Coghlan*] - - - - - - - 507

13. A will was proved in the West Indies, and a duly authenticated copy of it was sent to this country, accompanied by an affidavit, made by one of the attesting witnesses when the will was proved, showing that the will had been executed and attested pursuant to the Statute of Frauds: and that copy was admitted to probate in this country, and was produced in the Court of Chancery, with the affidavit annexed to it. The Vice-Chancellor, however, refused to establish the will, without full proof of its due execution and attestation. [*Rand* v. *Macmahon*] - - - - - - - 553

14. The Court of Chancery will establish a will made and proved in the colonies, on the production of a duly authenticated copy of it, provided the due execution and attes-

tation of the original is proved by the attesting witnesses. [*Rand* v. *Macmahon*] - - - - - 553

15. Testator being seised in fee of a house in the town of C., and of estates in the counties of H. and L., gave pecuniary legacies to his two sons (one of whom was his heir), and also to his two daughters, M. and C. He then gave to his wife, for her life, the possession of his house, together with the use of his plate, furniture &c., and the interest of his stock in the funds, during her life; save and except the clauses in favour of my daughters, as already mentioned; at her decease, it is my will and pleasure that M. and C. *shall divide equally between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others.*" Held that M. and C. took an estate in fee in remainder expectant on the death of the testator's widow, in the house in C., and an estate in fee commencing on the widow's decease, in the estates in H. and L.; and that the widow did not take a life-interest by implication in those estates, but that the heir took them, by descent, during her life. [*Davenport* v. *Coltman*] - - - 588

16. Testator, amongst other bequests, gave a freehold house, his furniture and certain other chattels, to his wife for life, and willed, that, at her death, his two daughters should divide equally, as *residuary legatees, whatever he might die possessed of, except what was already mentioned in favour of others.* The question was, what was the effect of the words in *italics*, with regard to certain real estates of the testator, which were not particularly mentioned in his will. Held that the Court ought not, in order to determine that question, to inquire into the value and other circumstances of the real estates, nor ought those circumstances to be stated in a case made for the opinion of a Court of Law upon the question. [*Davenport* v. *Coltman*] - 605

17. Testator devised his real estates to trustees in trust to sell, and to pay the proceeds to the person or persons who, at the decease of S. M. and M. W., was or were their heirs or co-heirs at law respectively, in equal moieties. One of the trustees was the testator's heir; and he and his co-trustees sold part of the estates shortly after the testator's death. The heir then died; and, after his death, it appeared that the persons who were the heirs of S. M. and M. W. at their respective deaths, had died in the testator's lifetime; and consequently the trusts declared in their favour, failed. Held that the testator's real estates were not absolutely converted, by his will, into personalty, but only for the purpose expressed therein, and, that purpose having failed, that they descended to his heir. Held also that the proceeds of that part of the estate which had been sold by the testator's heir and his co-trustees, was sold under an erroneous impression that one or more of the intended *cestui que trusts* might be in existence, and, consequently, that those proceeds also must be considered as part of the real estates of the heir. [*Ibid.*] 610

See ADMINISTRATION.—ADVOWSON.—ANNUITY, 2.—APPOINTMENT.—BOOKS.—DEVISE.—

EXECUTION.—JOINT-TENANCY.—LEGACY, 2. 4.—LONG ANNUITIES.—MORTMAIN.—POWER.—PRIORITY.—RELEASE OF DEBTS.—REMOTENESS.—SURVIVORSHIP.—TRUST.

WITNESS.

After a witness had been examined for the plaintiff, the defendant discovered that he was interested in the result of the suit. The defendant was allowed to issue a new commission for examining the witness and other persons to prove the fact. [*Selway* v. *Chappell*] 113

See COMMISSION TO EXAMINE WITNESSES.

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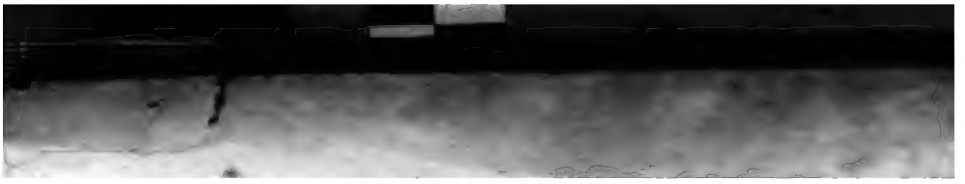
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